EDITOR'S NOTE

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91-723

No. ——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and LOCAL LODGE NO. 707, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD
and WAYNE A. GILBERT,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the NLRB exceed its statutory authority by ordering a union to reinstate to office a former elected business agent whose candidacy had recently been rejected by the union membership as a remedy for an unfair labor practice which had occurred more than four years earlier insofar as the NLRB's order is inconsistent with the primary Congressional policy underlying the LMRDA and/or because that order is based upon findings and assumptions about internal union elections—an area over which Congress has expressly declined to give the Board authority?

2. Did the Second Circuit Court of Appeals improperly grant enforcement of an NLRB order which requires reinstatement and backpay for a former elected union business agent where the Board's remedy was based upon speculation and assumptions about internal union elections—an area over which the Board has neither special expertise nor regulatory authority?

LIST OF PARTIES

Aeronautical Industrial District Lodge No. 91, International Association of Machinists and Aerospace Workers

Local Lodge No. 707, International Association of Machinists and Aerospace Workers

National Labor Relations Board

Wayne A. Gilbert

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AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and LOCAL LODGE NO. 707, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Aeronautical District Lodge No. 91, International Association of Machinists and Aerospace Workers, AFL-CIO (District 91), and Local Lodge No. 707, International Association of Machinists and Aerospace Workers, AFL-CIO (Lodge 707) (hereinafter collectively referred to as the Unions), petition that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Second Circuit entered in this case.

OPINION BELOW

The opinion of the Court of Appeals, reported at 934 F.2d 1288, appears in Appendix A attached hereto. (App. 1a) The decision and orders of the National Labor Relations Board, together with the decision of the administrative law judge, are reported at 298 NLRB No. 47 (1990) and appear in Appendices B-D attached hereto. (App. 26a)

JURISDICTION

The opinion of the Court of Appeals was announced on June 4, 1991. (App. 1a) A timely petition for rehearing and suggestion for rehearing in banc was denied on August 6, 1991. (App. 256a), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29: [1]

Section 158(a)(1)
Section 158(a)(3)
Section 158(a)(4)
Section 158(b)(1)(A)
Section 160(c)
Section 160(j)
Section 401, *et seq.*

STATEMENT OF THE CASE

This case arises from the decision of a union (District 91) not to recall a former elected business agent to his former position when an opening occurred in March of

[1] Relevant portions of the statutes are reproduced in Appendix F., *infra*, beginning at page 258a.

1985, and the subsequent decision to disqualify the former business agent from participating as a candidate in the next election for that position in February of 1986.

The Unions represent certain employees of United Technologies Corporation ("UTC") in Connecticut. The Charging Party, Wayne Gilbert, is a former employee of UTC's Pratt & Whitney Aircraft Division's North Haven facility, and a union member. In July 1982 Gilbert, along with several other union members, won election to the position of District 91 Labor Representative for a four-year term.[2] However, due to an austerity program instituted by the International Association of Machinists and Aerospace Workers (hereinafter "International Union" or "IAM"), in June 1983 three of the District 91 Labor Representative positions were eliminated, including the position held by Gilbert.

In December 1983, Gilbert and two other Local 707 members prepared and distributed a leaflet accusing members of the incumbent administration of the union of engaging in various improprieties. That leaflet triggered the filing of internal union charges against Gilbert, which caused Gilbert to file a series of unfair labor practice charges against Lodge 707, District 91, and the IAM between January and November of 1984.

Early in 1985 the International Union notified District 91 that funding would be available for one additional Labor Representative position. On March 11, 1985 that position was given to one of the other former Labor Representatives whose position had been eliminated in June 1983 rather than to Gilbert. Gilbert then filed unfair labor practice charges claiming District 91 had failed to recall him to the open position because he had engaged

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[2] District 91 Labor Representatives function essentially as union business agents, and are assigned to the various local lodges to assist with such matters as grievance processing, steward and membership education, organizing, and general contract administration issues.

in protected concerted activities and had filed charges with the Board.

During the month of February 1986, the affiliated Local Lodges of District 91 began the process of nominating and endorsing candidates for election to the position of Labor Representative. Each of the five Local Lodges in the District have the right to endorse one candidate for each of the seven available positions. The first step in this process is for the Local Lodge to accept nominations from the membership, and then to vote on which of the nominees to endorse. Only the names of the endorsed candidates appear on the District-wide ballot. All potential candidates, including incumbent Labor Representatives, must be nominated and then endorsed by the membership of at least one Local Lodge in order to be placed on the election ballot. The candidates receiving the highest number of votes are elected to four-year terms of office, which usually commence on May 1.

In February 1986 Gilbert's name was proposed for nomination for election as a Labor Representative at the nomination and endorsement meetings of Local Lodges 707 and 700. The nomination, however, was not accepted because at that time Gilbert did not meet the eligibility requirement of the IAM Constitution and District 91 Bylaws that candidates be employed in one of the shops represented by the District,[3] or employed by either District 91 or one of the affiliated Local Lodges, for at least one year prior to the nomination. As a result of that endorsement and election process on May 1, 1986, seven

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[3] On February 5, 1986, Gilbert signed a settlement agreement with UTC in which he voluntarily relinquished any right to reinstatement or future employment with UTC in any capacity, and therefore could not, and did not, claim to be employed in one of the shops represented by District 91. Gilbert did, however, contend that he was eligible to run in the 1986 election because he should have been employed by District 91 as a Labor Representative. (*See* App. 8a-9a; 201a-204a)

union members commenced their four-year terms as Labor Representatives.

On December 31, 1987, the administrative law judge issued an exceedingly long and discursive decision and recommended order finding that District 91 violated the Act by not recalling Gilbert as a Labor Representative in March 1985, and that District 91 and Lodge 707 improperly refused to permit Gilbert to be nominated as a candidate in the 1986 election. (App. 37a-255a) The Unions filed timely exceptions to the ALJ's determination with the NLRB.

When the next election for District 91 Labor Representatives was conducted in 1990, the Unions' exceptions were still pending before the Board. During the month of February 1990, Gilbert was nominated for endorsement by both Lodge 707 and Lodge 700, the same two Local Lodges from which he had sought endorsements from in 1986. Although four years had passed since that election without any final administrative ruling from the NLRB, the Unions nonetheless did not prevent Gilbert from participating in the 1990 election process. Gilbert did not, however, receive a sufficient number of votes to be one of the seven nominees selected for endorsement by either of those Local Lodges, and his name therefore did not appear on the ballot for the April 11, 1990 referendum election in accordance with the District 91 Bylaws.[4]

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[4] On February 28, 1990, while the Unions' exceptions were still pending before the Board, the Unions' filed a Motion to Reopen Record For Receipt of Additional Evidence. This motion sought to supplement the record by adding this evidence concerning Gilbert's participation in the February 1990 nomination process for the position of District 91 Labor Representative. The Board ultimately denied the motion to reopen the record on the grounds that the proffered evidence occurred after the close of the hearing and would not alter the result in this case. The Board further noted that the issues raised by Respondents' motion could properly be raised at the compliance phase of the NLRB's proceedings. (App. 31a) It was our contention before the Court of Appeals' and now before this

On May 1, 1990, the seven Labor Representatives elected by the membership of District 91 began new four-year terms of office.

Although the administrative law judge's recommended decision and proposed remedy had issued on December 31, 1987, the NLRB did not issue its decision in this case until April 30, 1990—almost three weeks after elections for District 91 Labor Representatives had been completed and just one day before the seven newly elected business agents began their four-year terms of office.

In its April 30, 1990 decision, the NLRB found that the Unions committed two distinct unfair labor practices. First, the Board found that District 91, in its capacity as Gilbert's employer, violated Sections 8(a)(1), (3) and (4) of the Act, 29 U.S.C. § 158(a)(1), (3) and (4), by failing to recall him to his former position as a Labor Representative when an opening occurred in March 1985. Second, the Board found that both District 91 and Lodge 707, in their capacities as labor organizations, violated Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), by refusing to permit Gilbert to be nominated as a candidate for the position of Labor Representative in February 1986.

To remedy these two unfair labor practice findings, the Board fashioned separate and distinct remedies. For the employer unfair labor practice under Section 8(a), the Board ordered District 91 to: 1) pay backpay from the date Gilbert should have been recalled to the end of the term of office (March 11, 1985 through April 30, 1986), and 2) reinstate Gilbert as an active Labor Representative if an opening occurs before the next election or, if

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Court, that the Board's denial of the motion to reopen, and its refusal to consider evidence with respect to the 1990 election in fashioning its remedy, constituted an abuse of discretion. In its opinion, the Court of Appeals, unlike the Board, did address the 1990 election but concluded that the Board's remedial order was nonetheless appropriate.

no such opening occurs, to nonetheless appoint Gilbert to a Labor Representative position for a period of at least thirteen months before the next election so that he will have that period of incumbency to campaign for office. (App. 28a-29a; 249a-250a) The next election is scheduled to occur in the spring of 1994.

As a remedy for the union unfair labor practice under Section 8(b)(1)(A) of the Act, the Board ordered District 91 and Lodge 707 to pay Gilbert the wages and benefits he would have earned as a Labor Representative from May 1, 1986, until he is permitted to "lawfully participate in an election as a candidate" for that position. (App. 36a)

The Court of Appeals approved the Board's unfair labor practice findings, and enforced the remedy in its entirety. The Unions filed a timely request for rehearing and suggestion for rehearing in banc which the court denied on August 6, 1991. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION TO ENFORCE THE NLRB'S REMEDIAL ORDER CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT BECAUSE ENFORCEMENT OF THAT ORDER IS INCONSISTENT WITH THE LMRDA

The decision of the Court of Appeals to enforce the Board's order that Gilbert be reinstated as an incumbent Labor Representative as a prerequisite to his later participation in an election directly conflicts with this Court's decisions in *Finnegan v. Leu*, 456 U.S. 431 (1982); *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942); and *Sure Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), insofar as that aspect of the NLRB's remedial order violated the fundamental democratic right of the union membership to elect its own representatives, and is therefore incon-

sistent with Congress' "overriding objective" in enacting the LMRDA. In addition, the particular issue raised herein regarding the relationship between the Board's authority under the NLRA to remedy unfair labor practices committed by unions and the independent interest of the union membership protected by the LMRDA is an important question of federal law which has not been, but should be, settled by this Court.

1. This Court has held that, in formulating remedies for unfair labor practices, the Board cannot view its functions under the NLRA in a vacuum, but must instead consider and accommodate Congressional objectives contained in other Federal statutes:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Southern S.S. Co., 316 U.S. at 47; *see also Sure Tan, Inc.*, 467 U.S. at 903. Similarly, when exercising its supervisory power over the Board, the courts of appeal must also examine the implications of NLRB remedial orders on other Congressional objectives, such as those expressed in the LMRDA, and must refrain from enforcing NLRB orders that intrude upon or are inconsistent with such other statutory schemes.

2. Congress passed the Labor-Management Reporting and Disclosure Act ("LMRDA" or "Landrum-Griffin Act") in 1957 for the purpose of establishing national policies and procedures for the regulation of certain aspects of the internal affairs of labor organizations, including the rights of union members in connection with

the selection of the individuals who represent their interests in collective bargaining. This Court has explained that the "overriding objective" of the LMRDA, 29 U.S.C. § 401 *et seq.*, is "to ensure that unions are democratically governed and responsive to the will of the union membership as expresed in open, periodic elections." *Finnegan*, 456 at 441; *Sheet Metal Workers v. Lynn*, 488 U.S. 347, 352 (1989). As a corollary to this principle, the Court has recognized that elected union officials are entitled to select a staff whose intra-union political views are compatible with those of the incumbent administration because the membership is entitled to be represented by business agents and others who will loyally implement the policies of those for whom the majority have voted. *Finnegan*, 456 U.S. at 441. Applying these same principles, the Court has determined that a newly elected union leader is not privileged to remove from office an elected business agent for political reasons because to do so would be inconsistent with the exercise by the membership of its electoral choice. *Lynn, supra.*

The thread which connects the Court's decisions in *Finnegan* and *Lynn* is the notion that the union membership is vested with final and complete authority to select the individuals who will represent its interest as union leaders, and thereby to effectively be the ultimate source of union policies. Thus, a newly elected representative is entitled to remove certain appointed union employees and replace them with individuals more likely to implement the policies of the new administration, but an incumbent officer may not remove from office another representative who was himself elected by the membership. In *Lynn*, the union's members had made a determination that its business agents would be elected rather than appointed, thus opting for the possibility of political diversity. The removal of Edward Lynn from office because of his political views was therefore inconsistent with the policy choice expressed by the membership in electing him. In both *Finnegan* and *Lynn*, this Court

affirmed the fundamental principle of the LMRDA that the choice of elected representatives is to remain exclusively in the hands of union members. This Congressional policy thus plainly prohibits the imposition of a representative whose candidacy has been rejected by the union's membership.

3. In 1990, Wayne Gilbert lawfully participated in the election for District 91 Labor Representative without interference. Although Gilbert obviously had by that time gained some notoriety amongst the membership as a result of his successes before the NLRB and the courts,[5] his election bid was soundly rejected by the membership. Thus in February 1990, the Unions' current membership exercised its LMRDA rights by selecting seven individual members to be their Labor Representatives for the next four years. Wayne Gilbert participated in that process but was not chosen.

Although the Court of Appeals acknowledged that the union membership has changed substantially since 1982 (the last time Gilbert was elected), neither the Court nor the Board examined the impact of the reinstatement order on the LMRDA rights of the union members who had recently expressly rejected Gilbert's candidacy in the 1990 election.[6] In enforcing the reinstatement remedy,

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[5] *See*, 276 NLRB 985, 120 LRRM 1272 (1985); 278 NLRB 39, 122 LRRM 1226 (1986), *enforced NLRB v. Local Lodge No. 707, Int'l Assoc. of Machinists and Aerospace Workers*, 817 F.2d 235 (2d Cir. 1987). As a result of the remedial provisions contained in these decisions—particularly those requiring publication of the Board's Notice—the membership received extensive and detailed information regarding the unfair labor practices found to have been committed by the unions against Wayne Gilbert well in advance of the 1990 election.

[6] Several of the Courts of Appeal, including the Second Circuit, have emphasized the importance of reviewing NLRB remedial orders in light of the circumstances in existence at the time the Board issues its decision, and have denied enforcement where the lapse of time between the underlying unfair labor practices and the

the Court of Appeals, like the Board itself, mistakenly failed to consider the reality that the "employer" in this case, District 91, is also a labor organization whose internal affairs are regulated primarily by the policies and procedures of the Landrum-Griffin Act. The Court's conclusion that, "Since enforcement of the Board's order furthers significant policies under the NLRA, we do not think that the delay renders the order unenforceable," (App. 25a) simply does not address the fact that imposition of the reinstatement remedy now, would directly contravene the "overriding objective" of the LMRDA. Indeed, the Second Circuit's reasoning flies in the face of this Court's proscription against the Board's single-minded attention to the NLRA to the exclusion of other equally important Congressional objetcives contained in other statutory schemes. *See Southern S.S. Co.*, 316 U.S. at 47; *Sure-Tan, Inc.*, 467 U.S. at 903.

The issue here is not whether there is some policy of the NLRA which might be furthered by reinstating Gil-

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Board's request for enforcement has caused the remedy to become inappropriate. *See, Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 189 (2d Cir. 1990), *cert. denied*, 60 USLW 3244 (1991); *Emhart Industries, Hartford Division v. NLRB*, 907 F.2d 372, 380 (1990); *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398 (5th Cir. 1991); *NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21, 23 (8th Cir. 1991); *NLRB v. Maywood Plant of Grede Plastics*, 628 F.2d 1 (D.C. Cir. 1980); *NLRB v. Greensboro News & Record, Inc.*, 843 F.2d 795 (4th Cir. 1988); *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984).

The Unions in this petition do not argue that lapse of time alone provides a sufficient basis to deny enforcement of an NLRB order, but rather that it is incumbent upon the reviewing court to examine the propriety of the Board's remedial order in light of the circumstances as they exist at the time the NLRB issues its decision. The Act plainly provides the Board with the authority to seek injunctive relief in appropriate circumstances, thereby avoiding potentially adverse effects of administrative delay. *See* NLRB Section 10(j), 29 U.S.C. § 160(j). Having chosen not to seek such relief at any time before the 1990 election, there is no plausible justification for the Board's disenfranchisement of those members who exercised their right to vote in that election.

bert to office, but instead whether that order conflicts with the membership's right to free choice protected by the LMRDA so as to preclude enforcement. Thus, it is not the fact of administrative delay alone that renders the order unenforceable, but rather the particular effects of that long delay on the interests of third parties (the union members) protected by a different Federal Statute. This issue was not even considered by the Board, and the Second Circuit failed to directly address the interference with membership choice inherent in the Board's order. Instead, the Court of Appeals skirted the issue by stating that: "To be sure, the present membership of the Unions did not select Gilbert as their Labor Representative, but it is also true that the Unions' members in 1985 were deprived of his services of 13 months by District 91's unlawful conduct," (App. 24a) The issue after the 1990 election is not simply that the present membership is not the same group of people which selected Gilbert when he was last elected in 1982, but rather that the current membership made a decision—through a lawful electoral process—that it did not wish to be represented by Gilbert. To require, as does the NLRB's order, that Gilbert be installed in office for 13 months beginning in 1993 as a representative of those same union members effectively invalidates the results of the 1990 election.[7]

[7] The Court of Appeals also seeks to justify the reinstatement remedy on the ground that the Board correctly determined that a period of incumbency is needed to make Gilbert whole for not being recalled in 1985 because incumbents have advantages in internal union elections, and in order to "guard against rewarding the unions for their misconduct." (App. 21a) This reasoning is flawed in several respects. First, it ignores the fact that the imposition of an incumbency period now, after the 1990 election, is inconsistent with the LMRDA, as discussed above. Second, the value and effect of incumbency presumed by the Board and the Court of Appeals is based upon factual assumptions that are beyond the Board's expertise and authority (*see infra* pp. 14-17), and therefore is plainly insufficient to overcome the membership's electoral rights. Third, focusing on the risk of rewarding the unions for their misconduct which is, according to the Court of Appeals, avoided by ordering

This Court's decisions make it plain that it was incumbent on the Board as well as the Court of Appeals to fashion a remedy that was not in conflict with the Congressional policy mandating that union members be free to select their own representatives through elections. By requiring that Gilbert be installed in office after his candidacy has been rejected by the membership unequivocally interferes with and effectively expunges the membership's right to select its own representatives, and thereby to democratically determine union policy. The reinstatement remedy therefore directly violates this Court's mandate that the Board accommodate its remedial orders so as not to conflict with Congressional policies embodied in other statutory schemes. Moreover, the enforcement of that order by the Court of Appeals raises important questions about the relationship between the NLRA and the LMRDA which have not been, but should be, settled by this Court.

II. THE COURT OF APPEALS' DECISION TO ENFORCE THE NLRB'S ORDER IS INCONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT BECAUSE THE BOARD'S REMEDIAL ORDER SEEKS TO REGULATE IN AN AREA WHICH CONGRESS EXPLICITLY DECIDED TO EXCLUDE FROM THE NLRB'S AUTHORITY

The NLRB's remedial order in this case is based upon unfounded assumptions and predictions about the conduct of internal union elections, a subject about which the Board has neither special expertise nor authority, and the decision to enforce that order therefore improperly intrudes into internal union affairs and is inconsistent with this Court's decisions in *NLRB v. Financial*

Gilbert reinstated to office, eschews the fact that it is not the union officials involved in the original unfair labor practices (none of whom hold any union office today) whose rights are infringed by the reinstatement remedy, but those of the unions' members, and they have engaged in no misconduct whatsoever.

Institution Employees of America, Local 1182 (Seattle-First National), 475 U.S. 192 (1986); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), and *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), as well as *Sure Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), and *Local 60, United Brotherhood of Carpenters and Joiners v. NLRB*, 365 U.S. 651 (1961). In addition, the issue raised herein concerning the authority of the Board to impose remedial orders for unfair labor practices which are based on its judgments about internal union election procedures, and which effectively involve the Board in regulating such elections, is an important question of federal law which has not been, but should be, settled by this Court.

1. This Court held in *Seattle-First National*, that the NLRB had exceeded its statutory authority by invalidating a union affiliation election as inconsistent with "minimal 'due process'" because nonunion employees were not allowed to vote. The Court reasoned that the NLRA does not give the Board authority to regulate union procedures for deciding internal organizational issues such as affiliation, and that the Board's rule violated the clear Congressional policy against governmental interference with internal union decision-making. 475 U.S. at 205-207. *See also, Sadlowski*, 457 U.S. at 116-117; *Allis-Chalmers Mfg. Co.*, 388 U.S. at 195; *NLRB v. Boeing Co.*, 412 U.S. 67, 71 (1973); *Scofield v. NLRB*, 394 U.S. 423, 428 (1969).

As this Court pointed out in *Seattle-First National*, when the NLRA was amended in 1947 to include union unfair labor practices, Congress considered but expressly rejected a proposal which would have empowered the NLRB to regulate in the area of internal union elections. 475 U.S. at 204, fn. 11.[8] Thus Congress has decided that

[8] The original bill passed by the House included as a union unfair labor practice, the denial of "a secret ballot and an open count of ballots cast, on any question involving . . . striking, the nomination

decisions about the election of union representatives would not be regulated by the NLRA, and that the propriety of internal union decisions about the procedures and results of elections of union representatives would be beyond the scope of the NLRB's power. This determination made in 1947, was reinforced in 1959 when Congress passed the Landrum-Griffin Act (LMRDA) which vested some regulatory authority over internal union affairs with the Secretary of Labor, and left the earlier decision to limit the role of the NLRB in this area unaffected. *See, Allis-Chalmers Mfg. Co.*, 388 U.S. at 194 ("The Eighty-Sixth Congress was thus plainly of the view that Union self-government was not regulated in 1947.")

The Board's decision in the instant case, that Gilbert must be installed in office for a period of thirteen months as a remedy for District 91's employer unfair labor practice so that he may run for election as an incumbent, is based entirely on the NLRB's assumption that Gilbert's current lack of popularity among the membership was caused by the 1985 failure to recall, that he would have won the 1986 election had he been permitted to run, and that incumbency provides an advantage to which Gilbert is entitled despite his recent rejection in the 1990 election and the passage of nine years since he was last elected to office. These are all areas over which the Board has neither authority nor expertise, and as to which its opinion is not entitled to deference by reviewing courts.

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and election of officers of local labor organization, . . . or to fail to hold elections of its officers and elective personnel at least once every four years . . ." H.R. 3020, § 8(c), 80th Cong., 1st Sess. (1947), U.S. Cong. & Admin. News, 1947, p. 135; 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, p. 182 (Legis. Hist.) This provision, along with other proposals for NLRB regulation of internal union affairs, were deleted from the final Legislation because "the Senate conferees . . . felt that it was unwise to authorize [the Board] to undertake such elaborate policing of the internal affairs of unions." *See* 93 Cong. Rec. 6601 (1947), 2 Legis. Hist.

Cf, Litton Financial Printing Division v. NLRB, 111 S.Ct. 2215, 2223-2224 (1991) (NLRB's interpretation of terms of collective bargaining agreement not entitled to deference); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951) (NLRB's findings must be set aside where not based on "a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.")

The order to appoint Gilbert as a Labor Representative against the membership's wishes and to compensate him for the pay he might have earned as a Labor Representative after April 30, 1986, is based solely on the Board's judgment, assumptions, and predictions about the conduct of internal union elections, an area in which Congress has explicitly decided to exclude the NLRB from regulating.[9] Moreover, although the Board's remedy does not explicitly require the rerunning of the 1986 election, the order does effectively invalidate the 1990 election process by requiring the installation into office of a member whose election bid was rejected by the membership. By so doing, the Board has plainly intruded into the regulation of internal union self-government and thereby exceeded its authority under the NLRA. By accepting

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[9] The only direct consequence of the unfair labor practice found to have been committed by the Unions in February 1986 was to deprive Gilbert of the opportunity to stand for nomination, and if nominated and endorsed, to participate in the election as a candidate. Assuming, *arguendo*, that the Board has properly found that the refusal to permit Gilbert to run in the election was due to his having engaged in activities protected under the NLRA, the Board could properly order the unions to undo that wrong by permitting Gilbert to be nominated and, if endorsed, run for election. Such a remedy would not unduly intrude into the internal affairs of the Unions, nor would it interfere with the membership's right under the LMRDA to select its own representatives. Simply allowing Gilbert to run would have avoided imposing an unwanted representative on the union membership and thus would have provided Gilbert with a fair opportunity to run while preserving for the membership its fundamental democratic rights.

the Board's findings regarding the electoral process and enforcing its intrusive remedy, the Court of Appeals has failed to abide by this Court's decisions in *Seattle-First National*, *Allis-Chalmers*, as well as *Litton*, and has disregarded the unmistakably clear intent of Congress to preclude the NLRB from regulating in this area.

2. Although orders of the NLRB which fall within the agency's regulatory authority are generally accorded substantial deference, this Court has explained that those orders must be "remedial in nature" rather than penal, and must therefore be "sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences" of the particular unfair labor practice at issue. *See*, *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984); *Local 60, United Brotherhood of Carpenters and Joiners v. NLRB*, 365 U.S. 651, 655 (1961); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940); NLRA Section 10(c), 29 U.S.C. § 160(c). This Court has further stated that Board orders which do not meet these standards, or which otherwise seek "to achieve ends other than those which can fairly be said to effectuate the policies of the Act," cannot be enforced by the courts. *Fiberboard Paper Products, Inc. v. NLRB*, 379 U.S. 203, 216 (1964), quoting from *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

As we explained above, there were two distinct and separate unfair labor practices alleged and tried before the Board. First, there was a charge against District 91 in its capacity as Gilbert's employer, claiming that its refusal to recall Gilbert as an employee in March 1985 violated Sections 8(a)(1)(3) and (4) of the Act. The position at issue, however, was one with a very specific and definite terms of office, i.e., from March 11, 1985 to April 30, 1986, or just over thirteen months. Assuming *arguendo*, that an unfair labor practice was committed, the Board properly ordered District 91 to compensate Gilbert for the pay and benefits he lost during that

thirteen-month period of time as a remedy for the § 8(a) violation. These were the actual losses caused by the failure to recall.

The second alleged unfair labor practice concerned the February 1986 refusal to permit Gilbert to be nominated as a candidate for election to the position of District 91 Labor Representative. These allegations were made against the Unions in their capacity as labor organizations under Section 8(b)(1)(A) of the Act, and do not relate to Gilbert's status as an employee but rather to his status as a union member. To remedy this violation, the NLRB has found the two Unions to be jointly and severally liable for backpay Gilbert would have earned as a District 91 Labor Representative from May 1, 1986 "until such time as Gilbert is allowed to lawfully participate in an election as a candidate for" that position.[10]

The Unions can only be held responsible for the harm actually caused by their alleged unlawful act, and the only direct consequence of that act was the denial of Gilbert's ability to *run* for election. Indeed, absent the ability to fill vacancies, the Unions do not have the power to decide who will be a Labor Representative. That decision is reserved for the membership by way of secret ballot election. In ordering the Unions to pay backpay from May 1, 1986 forward, the Board has in effect usurped that prerogative from the members, and taken that responsibility upon itself. Moreover, the Board is requiring the members of District 91 and Lodge 707 to compensate Gilbert for at least one and perhaps two addi-

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[10] The Board's denial of the Unions' February 1990 motion to reopen the record does permit the Unions to argue in the compliance stage of these proceedings before the Board that their back pay obligation ended in February 1990, when Gilbert was permitted to lawfully participate in an election. (*See* App. 31a, fn. 1, 36a fn. 6) The Board's Supplemental Order, however, raises questions about whether the Board intends to consider that position with an open mind. (*See* App. 28a-29a).

tional four year terms because a decision was made five years ago that he was not eligible to run for office.

The Board's backpay remedy is thus based on its own assumptions and predictions about what would have happened if Gilbert had been permitted to run in the 1986 election, all of which turn upon speculation about the Unions' internal election process and the possible responses the membership would have had to Gilbert's candidacy.[11] Every one of these "findings" are based entirely upon areas about which the NLRB has neither special competence nor authority. Those findings thus were not entitled to any deference, and the Board plainly exceeded its statutory authority by fashioning a remedy based exclusively upon factual predictions outside of its field of expertise. The Board's backpay order founded upon such unwarranted assumptions is necessarily speculative, and not "remedial in nature", and enforcement of that order by the Court of Appeals was therefore not consistent with this Court's decisions in *Republic Steel Corp.*, *Sure-Tan*, and *Seattle-First National.*

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[11] The Board's determination that the Unions should be held accountable for backpay since May 1, 1986 is based upon at least the following assumptions: (1) That Gilbert would have remained a Labor Representative from March 1985 through April 1986; (2) That Gilbert would have performed his duties as a Labor Representative "ably," and in a manner that made his effectiveness apparent to the membership; (3) That he would have received the endorsement of one of the Local Lodges which is necessary to be placed on the ballot; (4) That the members would have chosen to elect Gilbert in February 1986, despite the fact that he had by that time placed himself in an antagonistic position with respect to the elected leadership of the Unions; (5) That Gilbert's protected activities (circulating an inflammatory, derogatory flier about other union officials and filing NLRB charges against the Unions) would not have adversely affected his chances for reelection; (6) That the fact that he had permanently relinquished his Pratt & Whitney employment would not have adversely affected his chances for reelection, and (7) That despite all of these events, Gilbert would have been reelected for a third term of office in the 1990 election.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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November 4, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1216—August Term 1990

Argued: March 22, 1991 Decided: June 4, 1991

Docket No. 90-4123

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—and—

WAYNE GILBERT,
Intervenor,

—against—

AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and LOCAL LODGE NO. 707, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondents.

Before:

FEINBERG, MESKILL and ALTIMARI,
Circuit Judges.

Petitioner National Labor Relations Board seeks enforcement of its order finding respondent unions in violation of section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A), and sections 8

(a)(1), (3) and (4) of the Act, 29 U.S.C. §§ 158(a)(1), (3), (4), for various unfair labor practices, and requiring the unions to reinstate complainant to his former position as an elected union official for about 13 months, to then allow the complainant to run as an incumbent candidate for that office and to pay him backpay until that time.

Enforcement of the Board's order is granted.

GREGG D. ADLER, Hartford, CT (Gould, Livingston, Adler & Pulda, of Counsel), *for Respondents.*

EDWARD GALLANT, New Haven, CT (Keith Bradoc Gallant, Gallant & Gallant, of Counsel), *for Intervenor.*

KAREN L. ARNDT, Attorney, National Labor Relations Board, Washington, D.C. (Jerry M. Hunter, General Counsel, D. Randall Frye, Acting Deputy General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Paul J. Spielberg, Deputy Assistant General Counsel, National Labor Relations Board, Washington, D.C., of Counsel), *for Petitioner.*

FEINBERG, *Circuit Judge*:

The National Labor Relations Board (the Board) petitions for enforcement of its order, reported at 298 NLRB No. 47 (1990), against respondents Local Lodge No. 707, International Association of Machinists and Aerospace Workers (Local 707) and Aeronautical Industrial District Lodge No. 91, International Association of Machinists and Aerospace Workers (District 91). The Board found that Local 707 violated section 8(b)(1)(A) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(b)(1)(A), by filing a meritless lawsuit against Wayne A. Gilbert, the charging party before the Board

and an intervenor in this action, in retaliation for his protected activities. Local 707 was accordingly ordered to reimburse Gilbert for his legal expenses, and it does not oppose enforcement of this portion of the order. The Board also found that District 91 violated sections 8(a)(1), (3) and (4) of the Act, 29 U.S.C. §§ 158(a)(1), (3), (4), by refusing (as an employer) to recall Gilbert in March 1985 to the position of Labor Representative because he pressed unfair labor practice charges against the unions with the Board and engaged in protected intra-union activities. The Board further found that District 91 and Local 707 violated section 8(b)(1)(A) of the Act by refusing to allow Gilbert to be nominated in February 1986 as a candidate for Labor Representative in retaliation for his protected activities.

To remedy these violations, the Board ordered, among other things, that District 91 reinstate Gilbert as District 91 Labor Representative for a period of at least equal to the time remaining in the term for which he was unlawfully denied recall (about 13 months), thereby restoring his status as an incumbent. Thereafter, District 91 and Local 707 are to permit Gilbert to run as an incumbent candidate for election as a District 91 Labor Representative. Finally, the Board's order requires District 91 and Local 707 to reimburse Gilbert for back pay until such time as he is allowed to run for Labor Representative as an incumbent. Respondents oppose enforcement of these portions of the order, or in the alternative, seek a modification in the remedy. For the reasons given below, we enforce the Board's order in its entirety.

Background

This proceeding arises out of a bitter and protracted intra-union conflict. The relevant facts underlying the Board's order, however, are not in substantial dispute. District 91 is a delegate body affiliated with the International Association of Machinists and Aerospace Workers

(the International). It consists of elected representatives from the five local lodges representing employees at the facilities of Pratt & Whitney in North Haven and East Hartford, Connecticut. Local 707 is one of the locals affiliated with District 91. It represents employees working at the Pratt & Whitney North Haven facility. Pratt & Whitney is a Delaware corporation engaged in the manufacture and non-retail sale and distribution of aircraft engines and related products at North Haven and other locations in Connecticut.

District 91 employs a number of Labor Representatives who assist the locals in such matters as organizing, steward education and leaflet distribution. The Labor Representatives are full-time, salaried employees of the union. The District 91 Directing Labor Representative supervises the Labor Representatives and assigns them to service specific facilities represented by the affiliated locals. These assignments are periodically rotated.

Labor Representatives are employees of District 91, but they are chosen by election for four-year terms by District 91's members. Normally, elections for the position are held in April. In February, each affiliated local may nominate or endorse one candidate for each of the open Labor Representative positions. A candidate for the position, in addition to meeting certain mandatory qualification requirements outlined in the International's Constitution, must also receive the endorsement of at least one local. The names of the endorsed candidates appear on a district-wide ballot; the candidates receiving the highest number of votes are elected.

Gilbert was employed at Pratt & Whitney's North Haven facility from January 1973 until the company terminated him in July 1982. During that period, Gilbert held positions in statewide union organizations, served in several Local 707 offices and was its President from 1978 to 1982. Soon after Gilbert's discharge, Local 707 filed a grievance against the company on his behalf.

Later in July 1982, Gilbert, Robert Fleeting and Peter Tinella were each elected as District 91 Labor Representatives for four-year terms beginning in August. On August 1, Gilbert and Fleeting began serving their terms, thereby becoming employees of District 91. Tinella, who needed to work a few more weeks with the company in order to vest his pension, did not report to work as a Labor Representative until August 23.

In April 1983, the International notified District 91 that as of July it would be unable to fund three of District 91's nine Labor Representative positions. The District 91 Bylaws did not have a provision governing such a situation, and there was no precedent for it to rely upon. The Bylaws did prescribe though that any staffing action to be made by the Directing Labor Representative needed the approval of the District 91 Executive Board and Delegate Body. Accordingly, Charles Tracy, the Directing Labor Representative of District 91, obtained such approval to lay off Labor Representatives Gilbert, Fleeting and Tinella on June 30 "on the basis of seniority."

In the last week of May 1983, Pratt & Whitney announced that on June 3 it would lay off a number of employees at its North Haven facility. Had Gilbert been working at North Haven—his discharge grievance was still pending—the layoff would have affected him.

Thus, as of June 1, 1983, Gilbert expected that he would be laid off by District 91 from his Labor Representative position on June 30 and that he would be unable to return to work at Pratt & Whitney even if he were to win his arbitration by that time due to the impending layoff. On that day, Gilbert found out that the third-shift Safety Representative position was open at North Haven, a position that carried superseniority and was therefore not subject to the company's layoff plan. The following day, Gilbert and his attorney persuaded the shop stewart and another of the District 91 Labor Rep-

resentatives to ask Local 707 President Walter Nixon to designate Gilbert for the position. Nixon signed a letter of designation that day.

District 91's Bylaws prohibit an individual from holding the positions of Labor Representative and Safety Representative at the same time. On June 2, Gilbert asked District 91 Director Tracy to move up the date of Gilbert's layoff from his position as Labor Representative. Tracy rejected the request and insisted that Gilbert would have to resign as Labor Representative if he wanted the other position. Consequently, the next day Gilbert hand-delivered a letter to Tracy, which stated:

> I am requesting that my layoff as a Labor Representative be effective June 2, 1983 contingent upon the outcome of my current grievance arbitration case and the Company's acceptance of the Union's appointment of myself to Safety Representative.
>
> If it is absolutely necessary I will resign my position as Labor Representative contingent again, upon the conditions above with the same effective date.

Later that day, Pratt & Whitney rejected Gilbert's designation as third-shift Safety Representative because he was not an active employee. On the same day, the company implemented its planned economic layoff at the North Haven facility. On June 30, Gilbert, Tinella and Fleeting were laid off by District 91 from their positions as Labor Representatives.

In early September 1983, Gilbert won the arbitration on his discharge claim against Pratt & Whitney and was awarded reinstatement and back pay. A week later, the company informed Local 707 that because of the June 3 layoff, it could not reinstate Gilbert but would place him on leave-of-absence status. Local 707 thereafter brought suit to enforce the arbitrator's decision, claiming that since it had appointed Gilbert as a Safety Rep-

resentative prior to the June 3 layoff, Gilbert had a right to be reinstated to active duty.

In December 1983, Gilbert and two other Local 707 members prepared and distributed a leaflet that severely criticized the incumbent administration of the union, charging them with embezzlement, criminal activity and discriminatory treatment of Gilbert and others. Local 707 and the International then filed intra-union charges against Gilbert and his supporters in January 1984, and later tried them on those charges. Gilbert in turn filed unfair labor practice charges against Local 707 and the International, alleging that they had violated section 8 (b) (1) (A) of the Act by proceeding against him in retaliation for his activity set forth above, which is protected under the Act.

Gilbert testified before an administrative law judge in August 1984 in support of the unfair labor practice charges. A few days prior to that testimony, Local 707 cancelled Gilbert's membership. Local 707 then declared that Gilbert was ineligible to run for any elective union office, and the International approved this ruling. Gilbert again filed unfair labor practice charges, this time alleging that Local 707, District 91 and the International had violated section 8(b)(1)(A) of the Act by cancelling his union membership in retaliation for his protected activities. In November, Gilbert testified before an administrative law judge in support of these charges.

The following month, Local 707 filed an action in the Connecticut Superior Court, seeking $15,000 in damages and asking that Gilbert be enjoined from entering the Local 707 union hall, attending union membership meetings and harassing or intimidating union members. The state court denied the injunction request and dismissed the entire suit, finding that even if the complaint's allegations were true, Gilbert's actions did not "even approach the kind of conduct" described in the cases relied upon by Local 707.

Early in 1985, the International notified District 91 that funding would be available for one additional Labor Representative position. At a District 91 Delegate Body meeting in March, it was decided that Tinella would be recalled to fill that position. At that meeting, a delegate asked why Tinella was being recalled instead of Gilbert, who had the greater staff seniority, and he was told that Gilbert was not being considered for the position because he had previously resigned as Labor Representative.

Gilbert immediately sent letters to District 91, asking that he be recalled on the basis of seniority to the position given to Tinella. Tracy replied by a letter in which he insisted that Gilbert had resigned and reminded Gilbert that his union membership had lapsed, presumably due to the unions' cancellation of his membership.

In September 1985, the Board found that Local 707 and the International had violated section 8(b)(1)(A) of the Act by filing and processing internal disciplinary charges against Gilbert and others in retaliation for their protected activities. In January 1986, the Board again upheld Gilbert's unfair labor practice charges, finding that Local 707, District 91 and the International had violated this same section of the Act by cancelling Gilbert's union membership. The January 1986 order provided, among other things, that Gilbert's union membership be reinstated immediately and that Gilbert be allowed to attend union meetings and run for elective office. However, when Gilbert went to the Local 707 business office to pay his union dues, he was told that the union would not accept his dues because it was going to appeal the Board's decision. Eventually, Gilbert was able to pay his dues after having his attorney work the matter out with the unions.

In February 1986, Gilbert, Local 707 and Pratt & Whitney settled the suit that the union had brought to enforce Gilbert's arbitration award against the company. As part of the settlement, Gilbert agreed to waive any

and all rights to reinstatement to his job at Pratt & Whitney.

In that same month, the affiliated locals of District 91 began the process of nominating and endorsing candidates for election for seven Labor Representative positions. Gilbert's name was proposed for nomination at Local 700. However, under the District 91 Bylaws, to qualify as a Labor Representative the nominee had to be employed in one of the shops represented by the District or employed by the District or one of the locals for a year prior to the nomination.

Apparently in reliance upon this provision, one of the incumbent Labor Representatives reported to the members that it was his understanding that Gilbert was not eligible to run for the position under the terms of the District 91 Bylaws because he had resigned from the company. Local 700's President accordingly did not accept Gilbert's nomination. Similarly, when Gilbert's name was put up for nomination at the Local 707 meeting later that month, President Walter Nixon refused to accept the nomination because he determined that Gilbert was disqualified under the District's Bylaws.

In 1987, this court enforced the Board's order reinstating Gilbert's union membership and permitting him to be a candidate for any elective office in Local 707. NLRB v. Local Lodge No. 707, Int'l Assoc. of Machinists and Aerospace Workers, 817 F.2d 235 (2d Cir. 1978) (per curiam) (*Gilbert I*).

The various unfair labor practice charges that form the basis of this proceeding were filed in 1985 and 1986. In them, Gilbert claimed that the unions violated his rights under the Act by filing the lawsuit against him in Connecticut state court and by refusing to recall him as a Labor Representative in 1985 and to allow him to run for the position in 1986. The charges were consolidated, and a hearing before the administrative law judge

was held in December 1986. One year later, the administrative law judge issued his decision, finding against the unions on all of the charges and ordering that Gilbert be compensated for his legal expenses in defending the Connecticut suit, reinstated to his former position as Labor Representative, allowed to run for the position after establishing his incumbency and awarded back pay until then. In April 1990, the Board affirmed, with modifications, the rulings, findings and conclusions of the administrative law judge and adopted the recommended order. The Board then issued a supplemental order in October in which it clarified its previous order. This application by the Board to enforce its order followed.

Discussion

A. *Local 707's Lawsuit Against Gilbert*

A union violates section 8(b)(1)(A) of the Act if, "in bad faith, [it] files a baseless civil lawsuit against an employee that tends to restrain or retaliate against an employee's [protected activity]." Sheet Metal Workers' Int'l Assoc., Local No. 355 v. NLRB, 716 F.2d 1249, 1260 (9th Cir. 1983); see also Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 744 (1983). The Board found that Local 707 had violated section 8(b)(1)(A) because the action it had brought in Connecticut state court against Gilbert "was meritless and filed for a retaliatory motive." Consequently, Local 707 was ordered to reimburse Gilbert for all legal expenses he incurred in defending against this suit.

The unions do not challenge this finding or the remedy relating to it. "It is against this background that we consider the Board's remaining findings." NLRB v. Pace Motor Lines, Inc., 703 F.2d 28, 29 (2d Cir. 1983) (per curiam).

B. *District 91's Failure to Recall Gilbert in 1985*

The unions argue that there is insufficient evidence to support the Board's finding that District 91's decision as an employer not to recall Gilbert to the position of Labor Representative in 1985 violated sections 8(a)(1), (3) and (4) of the Act. We disagree. The Board found that District 91 had a "manifest antagonism toward Gilbert resulting from [his protected] activities." That antagonism is clear from District 91's treatment of Gilbert in retaliation for his protected activities, as adjudicated in *Gilbert I*. See 817 F.2d at 236-37. Indeed, Gilbert testified before the Board on those charges only a few months before District 91 decided to recall Tinella instead of Gilbert. In light of these circumstances, the Board could properly find that unlawful motivation played a part in District 91's decision not to recall Gilbert, since a finding of unlawful motivation may be supported by evidence of the proximity in time of the adverse action to the protected activity. See NLRB v. S.E. Nichols, Inc., 862 F.2d 952, 957 (2d Cir. 1988), cert. denied, 490 U.S. 1108 (1989).

Once it was established that Gilbert's protected activity was a motivating factor in District 91's decision not to recall him, the burden shifted to District 91 to show, as an affirmative defense, that it would have taken the same action in the absence of Gilbert's protected activity. NLRB v. Transportation Management Corp., 462 U.S. 393, 401-03 (1983). At the District 91 meeting at which the decision to recall Tinella was approved, the reason given for not recalling Gilbert was that he had resigned. Similarly, when Tracy responded to Gilbert's protestations on the matter, he gave this same reason and provided the additional reason that Gilbert's union membership had lapsed.

Clearly, it was impermissible for District 91 to refuse to recall Gilbert because his union membership had "lapsed," since in *Gilbert I* we found that the unions

unlawfully cancelled Gilbert's membership in retaliation for his protected activities. 817 F.2d at 237. Therefore, the only arguably permissible reason proffered by the union at the time of its decision not to recall Gilbert, was that he had previously resigned from his Labor Representative position. Gilbert's letter of resignation expressly states, however, that he was resigning "contingent upon the outcome of my current grievance arbitration case and the Company's acceptance of the Union's appointment of myself to Safety Representative." It is undisputed that the conditions to Gilbert's resignation were never fulfilled. Thus, until District 91 decided to recall Tinella instead of Gilbert, it treated Gilbert as having been laid off on June 30 rather than having resigned on June 2. The Board found that the record clearly established that neither Tracy nor District 91 actually implemented Gilbert's resignation as effective on the date specified in the resignation letter. For example, after he had received Gilbert's letter of resignation in June 1983, Tracy recommended to the District 91 Executive Board and Delegate Body that Gilbert, Tinella and Fleeting be laid off on June 30. In November 1984, when District 91 was pursuing Gilbert's grievance against Pratt & Whitney for not recalling him as a Safety Representative, District 91 stipulated that Gilbert was "laid off" on or about July 1, 1983. Finally, there was no evidence that District 91 ever notified the International that Gilbert had resigned, even though there was testimony that District 91 routinely notifies the International of an employee's resignation.

There was thus sufficient evidence before the Board showing that District 91's alleged refusal to recall Gilbert because he had resigned was merely a pretext to mask its unlawful motive. The Board could, therefore, properly find that District 91 committed an unfair labor practice by not recalling Gilbert as a Labor Representative in 1985. See Transportation Management Corp., 462 U.S. at 398.

The unions claim, however, that they sustained their affirmative defense by showing that District 91 would not have recalled Gilbert because of personal animosity between Gilbert and Tracy that predated Gilbert's protected activity. The Board found that this personal animosity was not sufficient to prevent Gilbert's recall. The unions contend that this finding is contrary to the evidence and is based on the incorrect assumption that Gilbert had a right to be recalled rather than Tinella. Instead, the unions argue, since District 91 has no provisions for either layoff or recall of its staff employees, it was within the discretion of Directing Labor Representative Tracy to recall Tinella, and so Gilbert could be denied recall despite his protected activities.

It is significant that at the time of the recall decision, District 91 proffered only pretextual reasons for not recalling Gilbert. The unions have not provided any reasons to us why, at the time the decision was made not to recall Gilbert, they did not justify the decision in terms of the personal animosity between Gilbert and Tracy, nor is there any persuasive evidence that the decision was in fact made for that reason. It is therefore reasonable to conclude that District 91's decision not to recall Gilbert was based on retaliation rather than the new set of reasons proffered by the union after the fact. See S.E. Nichols, Inc. 862 F.2d at 958; cf. Schwartz Mfg. Co. v. NLRB, 895 F.2d 415, 417 & n.9 (7th Cir. 1990) (shiftnig or inconsistent explanations evidence of pretext); McGraw-Edison Co. v. NLRB, 419 F.2d 67, 75 (8th Cir. 1969) (same). The Board accordingly had sufficient support for its finding that there was "no merit" to the union's claim that Gilbert would not have been recalled in any event because of personal animosity.

The unions' contention that it was wholly within Tracy's discretion whether or not to recall Gilbert is relevant for another reason, since the unions claim that a union official may refuse to make a discretionary appoint-

ment even though the refusal is retaliation for the applicant's protected activity. See Finnegan v. Leu, 456 U.S. 431, 441 (1982). This rule does not apply, however, when the position is filled by election rather than discretionary appointment. See Sheet Metal Workers' Int'l Assoc. v. Lynn, 488 U.S. 347, 355 (1989). The Board argues that this exception to *Finnegan* applies here, since Labor Representatives are elected. The unions dispute this view.

In *Finnegan*, former business agents of a union alleged that they were discharged by the newly elected union president because they had openly supported a different candidate in the presidential election. The agents accordingly claimed that their discharge infringed upon their free speech and voting rights as guaranteed by sections 101(a)(1) and (2) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 411(a)(1), (2). The Court found that the discharges did not violate the LMRDA, reasoning that in view of the LMRDA's "overriding objective" of union governance, it "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." 456 U.S. at 441.

However, the issue before us is not whether District 91's failure to recall Gilbert violated the LMRDA, but whether it violated the Act.

> [U]nlike the LMRDA, [the protections of section 8(a) of the Act] are intended to protect the employee-employer relationship. While the LMRDA may be the source for the protection of a union member's right to participate fully and freely in the internal affairs of his own union, the legality of these discharges must be resolved within the framework of the [Act].

NLRB v. Carpenters Local Union No. 35, 739 F.2d 479, 483 (9th Cir. 1984) (citation omitted), cert. denied, 472

U.S. 1017 (1985); see also NLRB v. Local 212, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 690 F.2d 82, 85 (6th Cir. 1982).

On this view, the unions' reliance on *Finnegan* is misplaced. Moreover, even if the rationale of *Finnegan* is applicable to violations of the Act and putting to one side the question whether Gilbert was appointed or elected within the meaning of *Finnegan*, the evidence showed that the recall decision was not an appointment to be made within Tracy's discretion.

The Board concedes that the District 91 Bylaws did not cover the issue of recalling Labor Representatives who had been laid off by the union. Nonetheless, there was sufficient evidence that District 91 had decided to deal with recalls on the basis of seniority. First, although the Bylaws do not cover layoffs of Labor Representatives, Gilbert, Tinella and Fleeting were laid off in accordance with seniority. It is thus reasonable to infer that recalls would be handled in the same manner. Additionally, at the District 91 meeting at which the decision was made to recall Tinella, a delegate asked why Tinella was being recalled instead of Gilbert, indicating the expectation of District 91 members that recalls would be decided on the basis of seniority. That this delegate was then told that Gilbert had resigned further indicates that Gilbert would otherwise have had a right to the job on the basis of seniority. Indeed, if the decision had been wholly within Tracy's discretionary authority, there presumably would have been no need to resort to pretext for justifying the recall of Tinella.

We accordingly find that there was sufficient evidence to support the Board's conclusion that the recall to the Labor Representative position should have been made on the basis of seniority, and that District 91 denied Gilbert his right to recall in retaliation for his protected activities and in violation of section 8(a) of the Act.

C. *The 1986 Election*

The unions argue that there is no evidence to support the Board's finding that they violated section 8(b) of the Act by refusing to allow Gilbert to run for office in 1986; they claim that Gilbert simply did not meet the qualifications for candidacy under Distrist 91 Bylaws. The Board concluded that if District 91 had recalled Gilbert as a Labor Representative in 1985, he would have been eligible as an incumbent to run for office in 1986. The unions do not object to this conclusion. Instead, they argue that even if Gilbert's ineligibility was the result of District 91's earlier unlawful activity, the unions' actions in 1986 were not in themselves unlawful but merely represented the lawful enforcement of the unions' constitution and bylaws.

We disagree. When the unions refused to allow Gilbert to run in the 1986 election Gilbert had already settled with Pratt & Whitney, thereby eliminating any possibility that he would be reinstated as an employee of the company. The terms of this settlement were known by District 91 and Local 707 officials, since the unions had represented Gilbert in these proceedings. The unions therefore knew at the time of the nominations that the only way Gilbert could be eligible for candidacy was if he were an incumbent Labor Representative, employed by District 91. But the unions also knew at that point that the only reason why Gilbert had not been recalled by District 91 in 1985—and was consequently ineligible for the election in 1986—was District 91's retaliation against him in 1985. Thus, by blocking Gilbert's nomination in 1986, the unions knowingly used the earlier unlawful retaliation as a means of engaging in further retaliation by denying Gilbert his protected right to run for office.

The conclusion that District 91 blocked Gilbert's nomination with unlawful motive finds ample support in the record. When the question arose about the eligibility of

two other candidates for the 1986 election, their situations were referred to the International for a ruling on their eligibility. Gilbert's eligibility was problematic, since he was an incumbent Labor Representative who had been laid off by District 91 and was challenging the legality of District 91's decision not to recall him in 1985. Indeed, the International had apparently never made an eligibility ruling applicable to such circumstances. Nonetheless, the unions did not seek a ruling from the International on Gilbert's eligibility before blocking his nomination. Such disparate treatment is evidence that the unions' asserted reasons for blocking Gilbert's nomination were pretextual. See Abbey's Transportation Services, Inc. v. NLRB, 837 F.2d 575, 582 (2d Cir. 1988). Moreover, when Nixon blocked Gilbert's nomination at the Local 707 meeting, Gilbert claimed that he was eligible as an incumbent Labor Representative. The Board found that Nixon then proceeded to deny Gilbert orderly process and "blocked any possibility for the [Local's] own timely rejection of Nixon's [adverse] ruling." Again, such disparate treatment belies the unions' contention that they were innocently enforcing their internal rules.

It would undermine the purposes of the Act if a union could use, with impunity, its earlier retaliatory acts to engage in future retaliation by what would otherwise appear to be lawful conduct. The unions had an arguable basis for finding that Gilbert was ineligible, but that makes no difference if the unions' true motive was retaliation and its illegal prior action based upon that motive was the cause of the ineligibility. See NLRB v. Local 294, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 470 F.2d 57, 62 (2d Cir. 1972). Since the Board found that to be the case and there was substantial evidence in the record to support the finding, the Board properly concluded that the unions thereby violated section 8(b) of the Act.

D. *The Remedy*

The unions raise a number of substantial challenges to the remedy adopted by the Board. Our scope of review in this regard is limited, however, since "Congress has delegated to the Board the power to determine when the policies of the Act would be effectuated by a particular remedy. In fashioning its remedies the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." Shepard v. NLRB, 459 U.S. 344, 349 (1983) (citation omitted).

1. *Back Pay.* Gilbert was awarded back pay from the time District 91 unlawfully denied him recall as a Labor Representative until the time the unions allow him to lawfully participate in an election as an incumbent candidate for that position. The unions do not dispute that the Board could properly award Gilbert back pay for his remaining time in office had he been recalled in 1985, but argue that their back pay obligation should terminate at the expiration of that term in 1986 since at that point Gilbert had to be elected for a new four-year term in order to continue as a Labor Representative. The unions claim that absent substantial evidence before the Board showing that Gilbert would have been re-elected in 1986, and again in 1990, the Board's back pay award is unenforceable because it is speculative and punitive.

Of course, there could be no conclusive proof that Gilbert would have been re-elected in 1986 had he been able to run as an incumbent candidate, since a properly conducted election with more than one candidate for a position always has an uncertain outcome. Uncertainty, however, does not render a back pay award speculative, since "[a] back pay award is only an approximation, necessitated by the employer's wrongful conduct." Bagel Bakers Council of Greater New York v. NLRB, 555 F.2d 304, 305 (2d Cir. 1977) (per curiam). Whether the

approximation here is speculative, rendering the back pay award unenforceable, depends on whether there was sufficient relevant factual information before the Board making it reasonable to assume that Gilbert would have been re-elected. Cf. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 901-02 n.11 (1984); NLRB v. Fugazy Continental Corp., 817 F.2d 979, 982-83 (2d Cir. 1987).

The unions contend that Gilbert may have lost his bid for re-election because he had waived his right to reinstatement with Pratt & Whitney, thereby undermining the union members' confidence in Gilbert to represent their interests adequately. However, the Board points out that union officials are often able to gain re-election even though years have passed since they ever returned to the employ of the company. The unions also discount the advantages of incumbency on the ground that one incumbent lost his bid for re-election in 1986. This evidence works strongly against the unions, however, since of the eight positions open, only one of the incumbents was defeated.

The record showed that Gilbert had been elected in the previous election in 1982 as well as to other union positions in a number of elections prior to that, including an election for President of Local 707. Gilbert was nominated for a Labor Representative position for the 1986 election at both the Local 700 and Local 707 meetings, was willing to run for the position and would have had the significant advantage of incumbency status in that election. In light of these circumstances, there was sufficient relevant factual information before the Board making it reasonable for it to assume that Gilbert would have been re-elected. The back pay remedy therefore is not speculative, and it is compensatory rather than punitive since Gilbert will not receive more than he would have earned had he been re-elected. To be sure, Gilbert may not have been re-elected, but "the Board can hardly be said to be effectuating policies beyond the purposes of the Act by

resolving the doubt against the party who violated the Act." Leeds & Northrup Co. v. NLRB, 391 F.2d 874, 880 (3d Cir. 1968). Indeed, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946).

2. *Reinstatement as an Incumbent Candidate.* The Board, in clarifying its original order, characterized this portion of the remedy as follows:

> The remedy requires that Gilbert serve as a labor representative for a period of time at least equal to the time remaining in the term for which he was unlawfully denied recall, in order to restore his status as an incumbent. After Gilbert has been afforded incumbency equivalent to the period from March 11, 1985, to April 30, 1986, District 91 and Local Lodge 707 shall permit Gilbert to run as an incumbent candidate for election to a District 91 labor representative position. [T]his remedy is designed to put Gilbert in the position he would have enjoyed had he not been unlawfully refused recall, without impairing the rights of other duly elected labor representatives and Union members. Because Respondent District Lodge 91 unlawfully denied Gilbert recall, thereby denying him a period of incumbency upon which to base any future campaign for office, the remedy is aimed at removing this handicap to the extent practicable in this legal context.

The unions challenge this remedy on a number of grounds. First, they argue that Gilbert was allowed to participate fully in the 1990 election for District 91 Labor Representatives and lost. Since this was the first scheduled election following the 1986 election, the unions argue that the Board's order no longer serves any remedial purpose. Central to the unions' argument is their contention that it was irrelevant in the 1990 election that Gilbert was not running as an incumbent.

As noted above, seven out of eight incumbents won in 1986, indicating the advantage of incumbency. Similarly, six of eight incumbents won in the 1982 election. Furthermore, it is reasonable to assume that incumbency is advantageous due to the nature of the job, since District 91 Labor Representatives are regularly before members in a variety of situations in which the Representative is able to represent and fight for employee rights. An incumbent has an opportunity to show the members what he can do for them and is able to gain name recognition with the membership. On this record, we believe that the Board could properly assume that significant advantages attach to incumbency. Requiring that Gilbert's incumbency status be restored prior to his running for Labor Representative is therefore appropriate since it both makes Gilbert whole for the loss he suffered and guards against rewarding the unions for their misconduct. See Fugazy Continental Corp., 817 F.2d at 982.

The unions make a more compelling argument that the Board does not have authority to order the reinstatement and election remedy because it unduly interferes with the unions' right to conduct their internal affairs as they see fit. They claim that the order intrudes upon the primary jurisdiction of the Secretary of Labor (the Secretary) under Title IV of the LMRDA, 29 U.S.C. §§ 481-483, the statute that specifically regulates the conduct of elections for union officers. See Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers v. Crowley, 467 U.S. 526, 539 (1984). The concerns raised by the unions have force in this context, since

> [r]eliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.

Calhoon v. Harvey, 379 U.S. 134, 140 (1964). Although we share the unions' concerns on this issue, we believe that the Board's order in this case does not unduly interfere with the unions' internal affairs or infringe upon the Secretary's primary jurisdiction.

As we found above, even if the unions' retaliation against Gilbert involves internal union affairs, it is nonetheless clear that the Act unambiguously regulates the conduct at issue in this case. The reinstatement component of the Board's order is a remedy for the unions' conduct that violated the Act, indicating that the Board has the authority to grant such a remedy. It is true that Title IV provides the exclusive means of redress "for challenging an election already conducted." 29 U.S.C. § 483. The Board's order, however, does not challenge an election that was already conducted, but merely requires that Gilbert be given an opportunity to run "for the next scheduled election" after he has been properly reinstated. The order thus does not implicate an ongoing election. Cf. Crowley, 467 U.S. at 546 (exclusivity of Title IV remedies extends to remedies that would substantially delay or invalidate an ongoing election). The order also does not require that the unions hold a special rerun election or call into question a prior election by displacing any previously elected Labor Representative to make room for Gilbert—remedies that are within the Secretary's jurisdiction. See 29 U.S.C. § 482(c); cf. Knisley v. Teamsters Local 654, 844 F.2d 387, 391 (6th Cir. 1988) (per curiam) (the Secretary of Labor apparently determined that election of business agent of union not covered by Title IV).

Rather than unlawfully interfere with union elections, the order merely requires that the unions give Gilbert the rights he had under the unions' constitution and bylaws but was deprived of by their unlawful retaliation. The remedy therefore falls squarely within the exception to Title IV exclusivity, which states that "[e]xisting rights

and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter." Id. § 483; cf. Calhoon, 379 U.S. at 139-41 (exclusivity of Title IV applies to challenges to a union's eligibility requirements for candidates for office but not to the union's discriminatory application of those requirements).

We accordingly find that the Board's reinstatement and election remedy does not run afoul of the Secretary's primary jurisdiction to regulate the election of union officers. Indeed, the Board's remedy in this respect is consistent in principle with the order we enforced in *Gilbert I*, which required that Gilbert's union membership be reinstated and that he be "permitt[ed] to be a candidate for any elective office in Local 707." 817 F.2d at 237.

3. *Administrative Delay.* Finally, the unions challenge the order on the ground that due to the length of time between the unlawful acts and the remedy, the underlying situation has so changed "that enforcement of the order now not only would undermine more labor policies tha[n] it would advance, but also would mock reality," citing Emhart Indus., Hartford Div. v. NLRB, 907 F.2d 372, 379-80 (2d Cir. 1990), and Olivetti Office U.S.A., Inc. v. NLRB, 926 F.2d 181 (2d Cir. 1991). According to this argument, Gilbert was elected by the union membership to represent them from 1982 through 1986, but the union membership has changed substantially since then and so requiring Gilbert's reinstatement at this point foists a Labor Representative upon the union membership who is not of their own choosing. Such a result, the unions contend, undermines the union membership's right to choose their own representatives.

We find *Emhart* to be inapposite. In that case, the unfair labor practice consisted of the employer's unilateral change to plant-wide seniority in its procedure for reinstating strikers. 907 F.2d at 375. The union and company

subsequently reached two collective-bargaining agreements that permitted the new practice of using plant-wide seniority. Id. at 380. The Board's order was issued thereafter and required that the company cease and desist from reinstating workers on the basis of plant-wide seniority and applied only to a plant that had already closed. Due to these changed circumstances, enforcing the order in that context clearly made little sense. Such changed circumstances, by contrast, are not present in this case. To be sure, the present membership of the unions did not select Gilbert as their Labor Representative, but it is also true that the unions' members in 1985 were deprived of his services for 13 months by District 91's unlawful conduct. Enforcing the order here also serves the salutary purpose of making Gilbert whole, whereas in *Ermhart* it was not clear that enforcement would serve any valid purpose. See also Olivetti, 926 F.2d at 189-90. Indeed, denying enforcement on the ground of delay alone impermissibly "punishes employees for the Board's nonfeasance." NLRB v. International Assoc. of Bridge, Structural & Ornamental Ironworkers, Local 480, 466 U.S. 720, 725 (1984) (per curiam).

Thus, unlike *Emhart*, it is clear that nonenforcement will undermine the Act. We find guidance for resolving this issue from NLRB v. Star Color Plate Service, 843 F.2d 1507, 1508 (2d Cir.), cert. denied, 488 U.S. 828 (1988), which dealt with the question of whether a five-year lapse between a certification election and the Board's order certifying the union rendered the order unenforceable because only a few of the employees who voted in the election were still in the bargaining unit. Although we recognized that enforcement "may impose a bargaining representative that is not wanted by a majority of employees and that this result is contrary to the policies of the Act," we nonetheless granted enforcement because failure to do so would also undermine policies of the Act. Id. at 1510; accord NLRB v. W.A.D. Rentals Ltd., 919 F.2d 839, 841-42 (2d Cir. 1990).

Since enforcement of the Board's order furthers significant policies under the Act, we do not think that the delay renders the order unenforceable. We have considered all of the unions' remaining arguments and find them to be without merit. We accordingly grant the Board's petition to enforce the order in its entirety.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 39—CA—2602
39—CB—806

AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (Pratt and Whitney, Division of United Technologies Corporation)

Cases 39—CB—679
39—CB—787

LOCAL LODGE NO. 707, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (Pratt and Whitney, Division of United Technologies Corporation)

and

WAYNE A. GILBERT, an Individual

SUPPLEMENTAL ORDER

On April 30, 1990, the National Labor Relations Board issued a Decision and Order in this proceeding, finding, inter alia, that the Respondents, Aeronautical Industrial District Lodge No. 91, International Association of Machinists and Aerospace Workers and Local Lodge No. 707, International Association of Machinists and Aerospace Workers, violated Section 8(b)(1)(A) of the Act by failing and refusing to allow Charging Party Wayne

Gilbert to be nominated as a candidate for election to the position of District Lodge Labor Representative. The Board also found, inter alia, that Respondent District Lodge 91 violated Sections 8(a)(1), (3), and (4) of the Act by failing to recall Wayne Gilbert to a position of District Lodge Labor Representative.[1]

On July 18, 1990, the Respondents filed with the Board a "Motion For Enlargement Of Time In Which To Request Modification Of Order," attached to which was a "Request for Modification And/Or Clarification of Order." Thereafter, the General Counsel filed a reply in opposition and the Charging Party filed a concurrence in that reply. On August 1, 1990, Respondents filed a Response to the General Counsel's opposition. Thereafter, the General Counsel filed a further response. On August 9, 1990, the Respondents filed a Reply to the General Counsel's further response. On August 23, 1990, the Charging Party filed a Supplemental Response to the Respondent's Reply to the General Counsel's further response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Respondents' motion and request and the opposition by the General Counsel and the Charging Party and has decided to grant the motion for an enlargement of time, deny the request for a modification of the Order, and grant the request for a clarification of the Order.

In their motion for an enlargement of time to file their request for modification, the Respondents assert that the need for modification or clarification of the Order did not become apparent to them until the first part of July 1990, when Region 34 communicated its position that full compliance with the Order requires that Charging Party Wayne Gilbert be reinstated as a District 91 labor representative for a period of time equivalent to the remainder

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[1] 298 NLRB No. 47.

of the term for which he was denied recall. The Respondents further assert that this interpretation of the Board's Order is inconsistent with the administrative law judge's explanation of the remedy, is punitive, and raises legal and practical problems.

The General Counsel, in his opposition to the motion, and the Charging Party in his concurrence with that opposition, respond to this motion as one for reconsideration. They contend that the Respondents assert no error of fact or law in the Board's Order, but, rather, assert a disagreement between the Respondents and Region 34 concerning compliance with the Board's Order. Accordingly, they assert that the Respondents have failed to satisfy the requirement of Sections 102.48(d)(1) and 102.49 of the Rules for a statement of particular material error, regardless of the apparent untimeliness of their request under Section 102.48(d)(2).[2]

To avoid even the possibility of ambiguity, we will grant the Respondents' request insofar as it is seeking clarification of the Order. The remedy requires that Gilbert serve as a labor representative for a period of time at least equal to the time remaining in the term for which he was unlawfully denied recall, in order to restore his status as an incumbent. After Gilbert has been afforded incumbency equivalent to the period from March 11, 1985, to April 30, 1986, District 91 and Local Lodge 707 shall permit Gilbert to run as an incumbent candidate for election to a District 91 labor representative position. As the judge stated in the underlying decision, this remedy is designed to put Gilbert in the position he would have enjoyed had he not been unlawfully refused recall, without impairing the rights of other duly elected labor representatives and Union members. Because Respondent District Lodge 91 unlawfully denied Gilbert recall,

[2] To the extent that the Respondent's request could be considered a motion for reconsideration of the Board's Decision and Order, we find that it is untimely filed.

thereby denying him a period of incumbency upon which to base any future campaign for office, the remedy is aimed at removing this handicap to the extent practicable in this legal context.[3] Accordingly,

IT IS ORDERED that the Respondents' motion for an extension of time to consider their requests for modification and/or clarification is granted. Having considered the requests, we decline to modify the Order. We clarify the Decision and Order only to confirm that Wayne Gilbert must be allowed to serve as a District 91 labor representative for a period of time equivalent to the period from March 11, 1985, to April 30, 1986, and then he shall be permitted to run as an incumbent candidate for election to a District 91 labor representative position.

Dated, Washington, D.C., October 24, 1990.

JAMES M. STEPHENS, Chairman

MARY MILLER CRACRAFT, Member

DENNIS M. DEVANEY, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

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[3] Although the Order provided the option of a special rerun election in order to toll the Respondents' backpay liability, such an election was not mandated by the Order.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 39—CA—2602
39—CB—806

AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (Pratt and Whitney, Division of United Technologies Corporation)

Cases 39—CB—679
39—CB—787

LOCAL LODGE NO. 707, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (Pratt and Whitney, Division of United Technologies Corporation)

and

WAYNE A. GILBERT, an Individual

DECISION AND ORDER

On December 31, 1987, Administrative Law Judge Robert G. Romano issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief and cross-exceptions and a supporting brief. The Charging Party filed a concurrence to the General Counsel's brief. There-

after, the Respondents filed an answering brief to the General Counsel's cross-exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] On March 5, 1990, the Respondents filed a motion to reopen record for receipt of additional evidence. The Respondents requested that the record be reopened for the sole purpose of receiving into evidence the affidavit of its directing labor representative, Andrew D. Romegialli. Counsel for the General Counsel filed a response in opposition to the motion and the Charging Party filed a concurrence to the General Counsel's opposition.

According to the motion, the basis for submitting the affidavit is that it constitutes previously unavailable evidence concerning events that have occurred since the close of the hearing and that demonstrate the inappropriateness of the judge's recommended remedy. That remedy, which we have adopted, includes a requirement that Charging Party Wayne Gilbert be permitted to run as an incumbent in the next election for the position of District 91 labor representative, that Gilbert be reinstated to any opening for such a position that may occur in the interim, and that Gilbert receive backpay until he is permitted to participate in an election for a labor representative position.

Romegialli's affidavit avers that the recommended remedy is improper because Gilbert, since the close of the hearing, has run in several internal District 91 elections and has failed to receive enough support to be placed on the ballot in such elections. Thus, according to the motion, the remedy would unnecessarily intrude on internal union affairs.

We agree with the General Counsel that the proffered evidence is neither "newly discovered" nor "previously unavailable evidence" because it did not exist at the time of the hearing. *Seder Foods Corp.*, 286 NLRB 215 (1987). Rather, the proffered evidence involves events allegedly occurring subsequent to the close of hearing and the issuance of the judge's decision and order. The Respondent has failed to demonstrate that the circumstances arising after the close of hearing would alter the result in this case. See National Labor Relations Board Rules and Regulations, Sec. 102.48(d)(1); *Presbyterian Hospital*, 285 NLRB 935 fn. 1 (1987). Accordingly, we deny the Respondents' motion. However, as the Respondents' contentions are related to the remedy imposed here, they may appropriately be raised at the compliance phase of this proceeding. *Challenge-Cook Bros.*, 282 NLRB 21, 26 at fn. 7 (1986), enfd. 843 F.2d 230 (6th Cir. 1988).

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified for the reasons set forth below, and to adopt the recommended Order.

In this consolidated case involving Respondents Local Lodge 707 (Local 707) and District Lodge No. 91 (District Lodge), the complaint alleged, inter alia, that Local 707 violated Section 8(b)(1)(A) of the Act on December 7, 1984, by filing a "Verified Complaint and Application for a Temporary and Permanent Injunction and Temporary Restraining Order" in the Superior Court of the State of Connecticut. Local 707's civil lawsuit against Charging Party Wayne Gilbert requested a temporary restraining order and a temporary and permanent injunction to prevent Gilbert from entering the Respondent Local's hall, from harassing and intimidating union members at the hall, and from attending union meetings. The superior court judge framed the issue before him as

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[2] The Respondents, citing *Wright Line*, 251 NLRB 1083 (1980), contend that District 91 would not have recalled Charging Party Gilbert to his position as district labor representative, and that District 91 and Local 707 would not have permitted him to be nominated for election to that position, even if he had not engaged in protected conduct. They argue that the judge therefore should not have found their actions unlawful. We find no merit in those assertions. Although there was some personal animosity between Gilbert and Directing Labor Representative Tracy that antedated Gilbert's protected activities, we cannot find, in the face of the Respondents' manifest antagonism toward Gilbert resulting from those activities, that he would not have been recalled to his district labor representative position in any event solely because of Tracy's personal dislike of him. The Respondents' contention that Gilbert would, in any case, have been denied nomination for the position of district labor representative in 1986 because he was not working at the trade is equally unpersuasive. According to the testimony of International Representative Almeida, if Gilbert had been recalled to that position in 1985 (i.e., if District 91 had not unlawfully refused to recall him), he would have been eligible to run as an incumbent.

whether Gilbert's conduct, regardless of his membership status, violated either the Union's bylaws or constitution or the "general law." Accepting as true every act that was claimed to have been committed by Gilbert, the superior court judge found that it did not "even approach the kind of conduct that is described in the cases" that had been brought to his attention. Finding "no basis upon which the Court should grant the Application for Temporary Injunction," the superior court denied the injunction request and dismissed the entire suit.

Judge Romano here concluded that Respondent Local 707's civil lawsuit against Gilbert violated Section 8(b)(1)(A) of the Act. In so concluding, however, he reasoned that where a civil lawsuit has been fully adjudicated and the plaintiff has not prevailed, the Board will nonetheless go beyond the state court's determination and consider, as a "threshold question," a respondent's reasonable basis for filing the unsuccessful lawsuit. Thus, according to the judge, a determination should be made as to whether there was a reasonable basis for the lawsuit prior to making any determination on whether the filing of the lawsuit was retaliatory. In making this inquiry here, the judge analyzed the reasonableness of the lawsuit on the basis of whether there were genuine issues of law and fact to be resolved. He concluded that there were genuine issues of law and fact based on the superior court judge's gratuitous comments made at the conclusion of the hearing. At that time, the superior court judge expressed his appreciation to both counsels for having presented legal claims and authorities, and for having focused on the problems and the issues in a professional manner. Judge Romano inferred that the superior court judge would not have made this comment if the plaintiff's case had been a sham or frivolous or rested on baseless and intentionally false or contrived fact, or was plainly foreclosed as a matter of law. Accordingly, he found that Local 707 did present a reasonable basis in fact and law for the lawsuit it filed, de-

spite the lack of success of the lawsuit. Nevertheless, finding that Local 707's "real motive" was to retaliate against Gilbert for his protected activities, the judge found that Local 707's lawsuit violated the Act.

Although we agree with the judge's ultimate conclusion that Local 707's civil lawsuit violated Section 8(b)(1)(A) of the Act, in our view, the judge's approach misperceived the Supreme Court's holding in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). There, the Court held that the establishment of a retaliatory motive and a lack of reasonable basis in fact or law are both essential prerequisites in order to *enjoin* the prosecution of a state court lawsuit. Thus, if the suit has a reasonable basis, the Board must stay its unfair labor practice proceeding until the state court suit has concluded. The Court also stated that should the plaintiff prevail and the state court find merit in the suit, he must also prevail before the Board because the filing of a meritorious lawsuit is not an unfair labor practice. If however, the plaintiff has not prevailed, its civil suit will be deemed to be meritless, and the Board's inquiry, for purposes of resolving the unfair labor practice issue, may proceed to resolving the question of whether a respondent/plaintiff acted with a retaliatory motive in filing its suit.[3] *Phoenix Newspapers*, 294 NLRB No. 3, slip op. at 8 (May 23, 1989).

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[3] In *Bill Johnson's*, the Supreme Court stated:

> If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief. [461 U.S. at 749.]

Chairman Stephens would not agree that, anytime a respondent charged with filing a retaliatory lawsuit loses on the merits after surviving summary judgment or judgment on the pleadings, there must be an automatic finding that the lawsuit had no reasonable basis in law or fact. He agrees, however, that the lawsuit at issue in this case had no reasonable basis in law or fact.

Here, as previously stated, the plaintiff (Respondent Local 707) did not prevail in its lawsuit. Thus, the merits of the civil suit have already been adjudicated against Local 707 and that adjudication establishes that the suit lacks merit. Accordingly, our inquiry turns to examining the Respondent's motive in filing its suit.

The judge considered the question of intent and found that the many acts of union animus directed against Gilbert, the overly broad injunction the Respondent sought, as well as the damage request, evidenced the Respondent's retaliatory motive.[4] The judge further found that the Respondent, Local 707, failed to establish in defense that it would have filed and pursued its lawsuit, in the manner it did, even if Gilbert had not engaged in protected Section 7 activity. We agree with these findings.[5] Accordingly, having found that Local 707's civil lawsuit

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[4] Member Cracraft finds it unnecessary to rely on the damage request as evidence of retaliatory motive.

[5] In agreeing with the judge that Local 707 failed to carry its *Wright Line* burden in this respect, we observed that Gilbert's disruptive actions at union meetings, which were Local 707's stated reason for filing its lawsuit against him, were the proximate result of Local 707's actions in canceling his union membership and then in denying him the opportunity to be nominated for union office on the ground that he was not a member in good standing. The cancellation of Gilbert's membership was unlawful, *Machinists District 91 (Pratt & Whitney)*, 278 NLRB 39 (1986), enfd. 817 F.2d 235 (2d Cir. 1987), and Gilbert's response, if intemperate, was not disproportionate to the Respondents' unlawful actions against him. In these circumstances, it is unavailing for the Respondents to argue that Local 707 would have sued Gilbert even if he had not engaged in protected conduct when, but for his participation in protected activities, there would have been no unlawful retaliation against him to provoke his disruptive acts.

Member Devaney does not join his colleagues in analyzing the Respondent's defense for filing the lawsuit under *Wright Line*. As the Board has adopted the judge's findings that the Respondent filed the lawsuit, which the state court found to be unmeritorious, with a retaliatory motive, he concludes that those findings are sufficient to establish that the Respondent's filing of the lawsuit violated Sec. 8(b)(1)(A). See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 749 (1983).

was meritless and was filed for a retaliatory motive, we adopt the judge's conclusion that the lawsuit violated Section 8(b)(1)(A) and adopt the judge's recommended remedy.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Aeronautical Industrial District Lodge No. 91 International Association of Machinists and Aerospace Workers, East Hartford, Connecticut, and Local Lodge No. 707, International Association of Machinists and Aerospace Workers, North Haven, Connecticut, their officers, agents, and representatives, shall take the action set forth in the Order.

Dated, Washington, D.C. April 30, 1990

JAMES M. STEPHENS, Chairman

MARY MILLER CRACRAFT, Member

DENNIS M. DEVANEY, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

[6] The judge found, inter alia, that both Respondents violated Sec. 8(b)(1)(A) of the Act by refusing to allow Gilbert to be nominated to a district labor representative position. To remedy this violation, we have adopted the judge's recommendation that the Respondents, jointly and severally, shall make Gilbert whole by payment of backpay to him, with interest, for the period May 1, 1986, "until such time as Gilbert shall be allowed to lawfully participate in an election as a candidate for [district labor representative] position." This approach affords the Respondents the option of holding a special election for the purpose of terminating their backpay obligation.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case Nos. 39-CA-2602
39-CB-806

AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (PRATT AND WHITNEY, DIVISION OF UNITED TECHNOLOGIES CORPORATION)

and

WAYNE A. GILBERT, an Individual

Case Nos. 39-CB-679
39-CB-787

LOCAL LODGE NO. 707, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (PRATT AND WHITNEY, DIVISION OF UNITED TECHNOLOGIES CORPORATION)

and

WAYNE A. GILBERT, an Individual

Mark W. Engstrom, Esq., of Hartford, CN, for the General Counsel.

Sheldon Engelhard, Esq. and *Daniel Ladow (Vladeck, Waldman, Elias & Engelhard, P.C.)*, of New York, NY, for the Respondents.

Edward Gallant, Esq. (*Gallant, Gallant & Culver*), of New Haven, CN, for the Charging Party.

DECISION

Statement of the Case

ROBERT G. ROMANO, Administrative Law Judge: I heard these consolidated cases at Hartford, Connecticut on 1-5, 9, and 10 December 1986. Wayne A. Gilbert, an individual charging party (Gilbert), filed a charge in Case No. 39-CB-679 on 18 April 1985 against Local Lodge No. 707, International Association of Machinists and Aerospace Workers (LL 707). Complaint in Case No. 39-CB-679 issued on 31 May 1985, alleging that on or about 7 December 1984, LL 707 had filed a "Verified Complaint and Application for a Temporary and Permanent Injunction and Temporary Restraining Order" against Gilbert in the Superior Court of the State of Connecticut, Judicial District of New Haven, ("Verified Complaint," or State lawsuit) in violation of Section 8 (b) (1) (A) of the Act. Gilbert filed a charge in Case No. 39-CA-2602 (also) on 18 April 1985 (amended 16 September 1985) against Aeronautical Industrial District Lodge No. 91, International Association of Machinists and Aerospace Workers (DL 91). Complaint in Case No. 39-CA-2602 issued on 30 September 1985, alleging that since on or about 11 March 1985, Respondent DL 91 has failed and refused to recall Gilbert to a position of district labor representative (dlr), in violation of Sections 8(a) (1), (3) and (4). (Initial) Order Consolidating Case Nos. 39-CB-679 and 39-CA-2602 for hearing issued on 30 September 1985.

Gilbert next filed a charge in Case No. 39-CB-787 against LL 707 on 20 February 1986, and a similar charge in Case No. 39-CB-806 against DL 91 on 7 April

1986. Further Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (hereinafter simply the Complaint) issued on 27 May 1986. The Complaint resultingly now *additionally* alleges that since on or about 1 February 1986 Respondent DL 91, and, since on or about 16 February 1986, Respondent LL 707, each respectively, has failed and refused to allow Gilbert to be nominated as a candidate for election to the position of dlr, in violation of Section 8(b)(1)(A) of the Act.

By most recent Answer dated 7 November 1986, Respondent DL 91 and Respondent LL 707 have each denied commission of any of the unfair labor practices as alleged in the complaint. Respondent DL 91 has further answered separately that it has not rehired Gilbert, since among other things, Gilbert resigned his position as a district labor representative of DL 91 in or around June 1983; and, that DL 91 has informed Gilbert that in accordance with its Constitution (Bylaws), and with the Constitution of the International Association of Machinists and Aerospace Workers (International), that Gilbert is ineligible to run as a candidate for the position of dlr. Respondent LL 707 separately answered that as of May 1984 Gilbert's membership in LL 707 lapsed because of Gilbert's failure to pay dues; and, that Respondent LL 707 notified Gilbert that Gilbert was ineligible to run as a candidate for election to the position of dlr, but LL 707 denies all allegations of having done so for unlawful reasons. Respondent unions also contend that a certain arbitration settlement arrived at between LL 707 and Gilbert, and Pratt and Whitney, Division of United Technologies Corporation (P&W), on 5 February 1986 impacts on certain allegations of the Complaint.

General Counsel has filed brief dated 4 March 1987 (adopted and subscribed to by Charging Party), as did Respondent Unions of same date, though with certain (accepted) errata later filed by unions on 11 March 1987. Upon request of Respondent Unions to file reply brief,

inter alia, to a claimed extraordinary remedy being sought by General Counsel in this latest matter, *viz.*, for a Board ordered rerun of an (interim) internal union election, pursuant to my Order thereon of 31 March (as extended 8 April) 1987, all parties have now filed additional briefs on the limited issue of the purported novel and/or extraordinary remedy, within allowed mail service date of on or before 22 May 1987.

Upon the entire record, from my observation of the demeanor of the witnesses, and after due consideration of the briefs of the parties, I make the following:

Findings of Fact

I. Jurisdiction

Jurisdiction is not in issue. The Complaint alleges, and Respondent by Answer (as amended at hearing) admits that P&W is a Delaware corporation with an office and place of business in North Haven, Connecticut (North Haven facility), where P&W is engaged in the manufacture of nonretail sale and distribution of aircraft engines and related products; that during 12-month period ending 31 March 1986, P&W sold and shipped products, goods and materials valued in excess of $50,000 from its North Haven facility directly to points located outside the State of Connecticut; and that P&W is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Complaint also alleges, and Respondents admit: that DL 91 is an unincorporated labor organization with office and place of business in East Hartford, Connecticut (East Hartford office); that DL 91 represents employees in collective bargaining; that during the same 12-month period, DL 91 has been part of International, a multistate labor organization which has its headquarters in Washington, D.C. and which collects annual dues from its affiliates in excess of $500,000; that DL 91 has itself

remitted per capita taxes in excess of $50,000 from its East Hartford office to International in Washington, D.C.; and that DL 91 is also an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Consolidated Complaint also alleges, and Respondent Unions DL 91 and LL 707 admit that each, respectively, is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practice Issues; and Background

A. *The Issues Defined*

In addition to the contended novel and/or extraordinary remedy issue raised as earlier noted, all parties appear to be in general accord in defining the basic substantive unfair labor practice issues. They are essentially three. Simply stated they are:

1. Whether Respondent LL 707 violated Section 8(b)(1)(A) of the Act by a filing of the "Verified Complaint" against Wayne A. Gilbert on 7 December 1984, where the State Court has subsequently denied the application on 14 December 1984. Essentially, the parties argue different applications of Supreme Court holding in *Bill Johnson's Restaurants v. NLRB*, 461 US 731 (1983), where it has been determined that a plaintiff has unsuccessfully brought a lawsuit in a state court.

2. Whether Respondent DL 91 has violated Sections 8(a)(1), and (3) and (4) of the Act by failing to recall Wayne A. Gilbert to a position of DL 91 Labor Representative on and after 11 March 1985.

3. Whether Respondent DL 91 on or about 1 February 1986, and/or Respondent LL 707 on or about 16 February 1986 violated Section 8(b)(1)(A) of the Act by failing and refusing to allow Wayne A. Gilbert to be nominated as a candidate for election to the position of DL 91 Labor Representative.

Preliminary general observations

This is the third consolidated unfair labor practice proceeding involving these same parties now to be brought before the Board in the space of 3-4 years. Facts material to the resolution of the instant issues, precede and post-date two prior proceedings. General Counsel and Charging Party rely on two prior Board decisions in which Respondent Unions were found to have restrained and coerced, *inter alia*, Wayne A. Gilbert in the exercise of Section 7 rights in violation of Section 8(b)(1)(A) of the Act, to establish the Respondent Unions herein have harboured continued union animus against Gilbert, and as explanatory background to support the allegations of continued union misconduct directed toward Gilbert. Respondent Unions argue for a limitation of the Board's prior decisions as bearing on the instant alleged unfair labor practices. Respondents otherwise (essentially) request there be close analysis of union efforts made (particularly by International) to follow their institutional Constitution and DL 91 Bylaws.

The Board has found that LL 707 violated Section 8(b)(1)(A) in *both* prior proceedings (as it did International, though International is not a named Respondent Union in this third consolidated unfair labor practice proceeding). Though DL 91 was a named Respondent Union in both prior consolidated proceedings, the Board has found DL 91 violated the Act *only* in the second consolidated unfair labor practice proceeding.

Respondent Unions also contend that a certain arbitration settlement reached between P&W, Gilbert and LL 707 on 5 February 1986, impacts on the issues material herein. The settlement eventually reached covered, *inter alia*, Gilbert and LL 707 grievance(s) filed against P&W in July 1982, continuously pressed thereafter by LL 707 (including) by later separate LL 707 (noncompliance) grievance, filed on 15 September 1983. General Counsel

and Charging Party on the one hand, and Respondent unions on the other, accuse their opponents, respectively, of having advanced positions in the instant proceeding inconsistent with certain positions they have advanced in earlier proceedings.

B. *Background facts; uncontested, or previously determined*

1. DL 91 and LL 707 structure

A DL is defined in Article XXII of International's Constitution as a delegate body made up of representatives duly elected from the LLs within the railroad or air transport system, industry, or locality in which they are established. DL 91 (currently) has five (5) such affiliated locals. Four of the five, including LL 707, represent employees employed only at P&W's facilities (all) located in the State of Connecticut. Thus LL 707 represents employees at P&W's North Haven facility; LL 700 represents employees at P&W's Middletown facility; LL 1746 represents employees at P&W's East Hartford facility; and LL 1746 A represents employees at P&W's Southinghton facility. The fifth affiliated LL 743 represents employees of a different Employer, Hamilton Standard. (Hamilton Standard however, is a company also affiliated with UTC, parent of P&W.) Since 1972 Respondent LL 707 has been the exclusive collective-bargaining representative of a production and maintenance unit at P&W's North Haven facility. LL 707 maintains its office, and a union hall at North Haven. In material times, DL 91 maintained its offices at LL 1746's East Hartford facility.

2. Gilbert's P&W employment, related union service; and LL 707 officers

P&W first employed Gilbert as a machine operator at its North Haven facility in 1973. Gilbert, in the ensuing

years, became a very active member of LL 707, serving in a variety of local lodge offices. Over the next 9-10 years, Gilbert served LL 707 as shop steward, senior shop steward, shop committeeman, safety representative, chief safety representative, vice president and president.

Elected in October 1978, Gilbert served as president of LL 707 from January 1979 to 31 July 1982, at which time he resigned to take a DL 91 dlr job to which he was recently elected. Mary-Alice Moran served with Gilbert as LL 707's recording secretary from 1979 through 1982, but thereafter declined to run again. However, her mother, Alta (Jean) Moran, served as financial secretary of LL 707 from January 1982 until suspended from that office on 13 January 1984, thus serving for a time under Gilbert, but for the most part during a different administration under Gilbert's successor, Gary Nilson. Nilson (apparently) initially appointed Walter Nixon as vice president. At time of Alta Moran's suspension, Dean White became acting financial secretary of LL 707. Nilson remained as president of LL 707 (at least) through August 1984.

Walter Nixon is currently the president of LL 707 with present term commencing in January 1986. Nixon previously served an interim period as President in 1984, namely from 16 September through December 1984, after serving as acting president since 4 September 1984. (Nixon did not run for the presidency in 1985.) Other officers of LL 707 were then Ronald Obier, vice president, Dean White, financial secretary, and Henry Jackson, recording secretary.

On 1 July 1982 (thus while Gilbert was still president of LL 707), P&W discharged Gilbert. Gilbert and LL 707 promptly grieved Gilbert's discharge. LL 707 has since processed grievance(s) on Gilbert's discharge with P&W through (initial) arbitration, and beyond.

3. Gilbert's DL 91 employment; and DL 91 elections

Normally dlr elections are held in April of an election year. A dlr is a full-time salaried employee of the DL. Dlrs are elected by receipt of the highest cumulative vote of all the members (of affiliated local lodges) who are eligible to vote, and vote. On 14 July 1982, in a rerun election, discussed further *infra*, Gilbert, along with two other individuals (Peter Tinela and Robert Fleeting) were initially elected as dlrs of DL 91. Six of eight incumbent dlrs were also reelected. They were all to serve a (common) four year term (starting 1 August 1982, and ending 30 April 1986). It was upon successful election to DL 91 dlr office that Gilbert resigned as president of LL 707, effective 31 July 1982.

DL 91 thus employed 9 dlrs. Gilbert, Tinella and Fleeting were the least senior dlrs. Dlrs are managed by a Directing Labor Representative (Directing LR), a position separately elected, and occupied from May 1981 till May 1985 (and thus in most of the material times) by Charles Tracy. By letter dated 23 July 1982, Directing LR Tracy notified P&W that DL 91 was requesting a leave of absence for Gilbert (to be a dlr) for the period 1 August 1982 through 30 April 1986. By letter dated 29 July 1982, P&W advised Tracy that P&W would *not* grant the requested leave of absence to Gilbert, because Gilbert's employment with P&W had been earlier terminated on 1 July 1982.

Upon election to office, a dlr is assigned to service a facility that is represented by an affiliated local lodge. Assignments of dlrs are up to, and made by the Directing LR; and they are periodically rotated. The assigned dlr will assist that local lodge in organizing, steward education, leaflet distribution, workmen's compensation matters, and various other local lodge problems. Gilbert initially serviced LL 707 (North Haven). Apparently after only a few months, Gilbert received another assignment to the clear displeasure of (then) financial secre-

tary Alta Moran. Moran thereafter had continuing difficulties with an (essentially) new administration of Local Lodge 707 under (then) president Nilson, and his appointed new vice president (Nixon). Dlr Andrew D. Romegialli thereafter (and through September 1984) serviced Local Lodge 707's (North Haven) facility. Dlr Jim Parent serviced Local Lodge 707 from on or about 1 October 1984, through May, 1986).

As noted, the terms, for which the dlrs were elected for employment by DL 91, were the same. However Gilbert and Fleeting commenced work as a DL 91 dlr earlier than Tinella. Tinella did not report for work at DL 91 as a dlr until 22 August 1982. Tinella made prior arrangements, discussed further *infra*, whereby Tinella took P&W paid vacation time through 21 August 1982 in order to personally vest (10-year) pension as an employee of P&W, on 21 August 1982. In contrast, Gilbert received his initial paycheck as an employed DL 91 dlr for workweek ending 21 August 1982. The paycheck itself was dated 18 August 1982.

4. P&W and DL 91 layoffs

A P&W layoff, *inter alia* of (North Haven) employees took place on 3 June 1983. A DL 91 (conceded) economic layoff of three (3) dlrs took place on 30 June 1983. Gilbert was aware of the DL 91 prospective layoff months before, and he correctly anticipated he would be laid off by DL 91. Gilbert did not learn of the P&W layoff until very late May; and shortly thereafter Gilbert learned of a (related) third shift safety representative opening at P&W's North Haven facility.

DL 91 dlrs were (at least de facto) laid off on the basis of DL 91 employment seniority. However, a material and principal conflict arises between the parties on whether Gilbert was actually laid off (along with Tinella and Fleeting) by DL 91, effective 1 July (with last day worked 30 June, albeit paid through 4 July 1983), as

General Counsel and Charging Party contend, or, whether Gilbert had earlier resigned as a dlr of DL 91, effective on 2 June 1983, as Respondent DL 91 has contended. Respondent Unions contend that Gilbert resigned from DL 91 dlr position earlier in order to obtain an appointment from LL 707 as LL 707's third shift safety representative (which carried contractual superseniority) at P&W's North Haven facility *before* the scheduled P&W layoff was effected at the North Haven facility on 3 June 1983. The arbitrator completed the hearing on Gilbert's grieved P&W (1982) discharge some time in early June 1983.

It appears to be uncontested by the parties that an individual cannot simultaneously be a paid (actively employed) DL 91 (dlr) employee and a paid (actively employed) P&W (safety representative) employee. Moreover, dlrs (apparently by custom, if not by contract) are not allowed the necessary P&W facility access to function as a safety representative. Nonetheless, it is General Counsel's and Charging Party's essential position that Gilbert had effectively submitted only a *conditional* resignation to DL 91; and that the explicit condition precedent for Gilbert's resignation from DL 91 dlr status to have actually taken effect, never occurred, as DL 91 (and LL 707) well knew, because P&W refused to accept LL 707's appointment of Gilbert as third shift safety representative at the North Haven facility, in keeping with P&W's position (as then being pressed in arbitration) that Gilbert was a previously (properly) terminated employee. In support of their positions, the parties have presented certain conflicting evidence of events and circumstances bearing on this subordinate issue of actual Gilbert employment status. The proffered evidence bearing on this single issue spans a period stretching (essentially) from May-June 1983 through February 1986.

5. The initial arbitration decision

On 7 September 1983, the arbitrator sustained Gilbert's grievance on P&W's discharge of Gilbert. The arbitrator set aside Gilbert's termination, and ordered P&W to reinstate Gilbert. By letter dated 9 September 1983, P&W notified Gilbert, that in response to the arbitrator's decision, Gilbert was being reinstated as an employee on leave of absence from 1 August 1982 through 30 April 1986. By letter dated 14 September 1983,[1] P&W notified LL 707 that because of the P&W layoffs experienced on 3 June 1983 it was not possible to reinstate Gilbert to active employment. All parties agree that without a prior *effective* designation by LL 707 of Gilbert as its third shift safety representative, Gilbert's seniority with P&W was such that he would have been caught in P&W's layoff of 3 June 1983.

On 15 September 1983, LL 707 filed an additional grievance alleging that P&W had failed to (fully) comply with the arbitrator's decision on Gilbert's grievance. LL 707's stated position in its grievance was that LL 707 had previously appointed Gilbert to third shift safety representative position (a superseniority position) prior to P&W's 3 June 1983 layoff; and that, accordingly, Gilbert should be reinstated to that position at P&W's North Haven facility. By letter dated *11 October 1983*,

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[1] The date of 14 September 1983 appears as it is reflected in the (grievance) Settlement Agreement fact recital, pursuant to subsequent party agreement, rather than as incorrectly shown in other (stipulation) document. Relatedly Respondent's Ex. 2 a (copy of the letter) (shown offered and received for the purpose of curing the questioned date discrepancy does not appear in Respondent's Exhibit file as submitted, (apparently) foregone in light of the clarification made of record subsequently. In passing I further observe that Respondent's Ex. 2(b) also offered and received, does not appear in Respondent's Ex. file. Respondent's Ex. 2(b) is the Board's Subregion 39 letter dismissing Employer's charge filed against LL 707 in Case No. 39-CB-493 discussed further *infra*, a fact of which I, and the Board may take official notice.

Respondent DL 91 (relatedly) requested P&W to discontinue Gilbert's leave of absence. By letter dated 26 October 1983, P&W declined to do so.

On 9 November 1983 LL 707 filed a petition in the United States District Court for the District of Connecticut seeking to compel P&W to submit the grievance(s) that LL 707 had filed over P&W's refusal to reinstate Gilbert (to third shift safety representative position) to arbitration, or, alternatively for an order enforcing the arbitrators' award on Gilbert's (prior) grievance. LL 707's declared position therein was that the arbitrator's decision (on Gilbert's grievance) required P&W to reinstate Gilbert to active employment as third shift LL 707's previously designated safety representative. As will be observed *infra*, essentially all of the above had occurred *before* any union's commission of an unfair labor practice against Gilbert, as heretofore determined by the Board, but well after there was some confrontation between Directing LR Tracy and (then) LL 707 president Gilbert over the performance of dlr Lou Fyes, (then) assigned to service LL 707. (Flyes was not reelected in the 1982 election.)

It is this background of bifurcated District and P&W employment status, with its origin back in June-July 1983 events, which is the basic medium of General Counsel's present complaint allegation that since on or about 11 March 1985, some 21 months later, on the occasion when a DL 91 dlr position first again opened up, and while LL 707 continued to press in U.S. District Court for Gilbert's reinstatement as third shift safety representative, that DL 91 has failed and refused to recall Gilbert, in violation of Sections 8(a)(1), (3) and (4). Much, as presaged, had occurred in the interim.

6. Prior proceedings

a. *prior unfair labor practice charges filed*

Instant complaint alleges and Respondent Unions admit that from on or about 17 January 1984 through on or about 15 November 1984 Gilbert filed several (complaint-enumerated) unfair labor practice charges against Respondent LL 707; that Gilbert gave (related) testimony in the form of affidavits; and that Gilbert testified against Respondent LL 707 at a (related) unfair labor proceeding. Actually Gilbert testified against LL 707 in two successive consolidated unfair labor practice proceedings heretofore brought before the Board in 1984. The first such consolidated unfair labor practice proceeding, brought against International, DL 91 and LL 707, was held before Administrative Law Judge Joel A. Harmatz on 22-24 August 1984. The second unfair labor practice proceeding also brought against International, DL 91 and LL 707 was held before Administrative Law Judge Harold B. Lawrence on 15 November 1984.

On 7 May 1984 Gilbert obtained employment with the National Association of Government Employees, International Brotherhood of Police Officers (simply NAGE). The instant complaint also alleges, and Respondent Unions admit, that from on or about 8 May 1984 through on or about 19 September 1984 that Gilbert filed charges, and amended charges, against Respondent DL 91; and that Gilbert also testified against Respondent DL 91 at (both prior) Board unfair labor practice proceedings.

b. *Prior Board and Court determinations*

i. *The first prior consolidated proceeding*

The instant case is thus actually the third (consolidated) unfair labor practice proceeding to involve Gilbert and DL 91 and LL 707. In the first such proceeding, *Machinists Local 707 (United Technologies)*, 276 NLRB 985 (1985), the Board on 30 September 1985 adopted

earlier (central) "Finding and Conclusion of Law" as rendered by Judge Harmatz on 17 January 1985, that by filing and processing (certain) internal disciplinary charges against employees (Gilbert, and the Morans) because they participated in *intra*union activity in preparing and/or distributing views and opinions critical of union officials, Respondent LL 707 and International had violated Section 8(b)(1)(A). Significantly however, Judge Harmatz concluded that it was not established on the record before him that DL 91 had done so. *Id.* 997.

The following supportive findings made by Judge Harmatz may be observed as pertinent background:

> In November 1983, George Almeida, a representative of Respondent International was assigned to District 91 apparently to aide (sic) in the correction of certain administrative problems within that organization. During the following month internal elections within Local 707 were scheduled. The only positions at stake were delegate slots. In early December, in connection with the election, Gilbert, together with the Morans, drafted the leaflet which lies at the cornerstone of this proceeding. That document in so many words criticized the administration of Local Lodge 707 prior to Gilbert's election to the presidency in 1978, praised his administration, and was severely critical of the Local's incumbent officials. *Id.* 986.
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> It is understatment to observe that reference to forgery, theft and the use of narcotics were highly provocative and likely to arouse concern of union officials. Indeed the sensitivity of Local 707 to these accusations is underscored by the fact that it is not beneficiary to a union shop arrangement, but exists on an open shop basis.[7]
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> * * * *

[7] Pursuant to a post hearing stipulation, it appears that of the 2313—employees in the unit only 1619 are members of the Local (Ex. reference omitted). *Id.* 987.

Local 707 held a regular membership meeting on January 15, 1984. During the course thereof, disciplinary charges against Gilbert and the Morans were read to the membership and served. All were accused of the following:

> . . . conduct unbecoming of a member under Article 11 Section 3 of the IAM constitution . . . by . . . actions of distributing literature that was vicious and malicious in it's (sic) content. The literature was worded in such a manner as to destroy the IAM and its affiliated Local Lodge 707. (footnote omitted). *Id.* 988.

* * * *

> [I]t is concluded that Respondent Local 707 and Respondent International violated Section 8(b)(1)(A) when, about December 12, 1983, Grand Lodge Representative George Almeida attempted to dissuade them (the Morans) from distributing the leaflet in question by advising that if they did so, they would suffer 'dire consequences' including 'internal union charges and civil litigation.' (footnote omitted) *Id.* 992.

* * * *

> [I]t is further concluded that Respondent Local Lodge 707 and the International violated Section 8(b)(1)(A) by filing in January 1983 (sic, but clearly 1984, *supra*) and later processing internal union charges against Wayne Gilbert and the Morans specifically (italics) founded upon their involvement in the preparation and distribution of the election propaganda. (Footnote and case citation omitted). *Id.* 992.

Judge Harmatz also found that (certain) second, or subsequent additional internal union charges brought on matters on their face unrelated to the distributed leaflets were shown in their total circumstances, including by convincing evidence, as pretextual, and such as would not

have been registered had not Gilbert (and the Morans) engaged in the protected act of publicly criticizing the leadership of LL 707. Addressing Almeida's concession that distribution of the leaflet was the immediate cause for a collteral investigation, directed by the International, that ultimately produced certain new charges against Gilbert (and the Morans), which were also heard before the Trial Committee on 16 May 1984, Judge Harmatz concluded of Almeida's role:

> His desperation to vindicate, through these charges, the hostility held against the Charging Parties is evident from the reckless fashion in which they were pursued. All of the allegations appear to have been hastily contrived, several were totally lacking in evidentiary support, and others were offered in a context showing that the Charging Parties had been singled out disparately.' *Id.* 992.

Concerning the pretextual nature of the written and unwritten (additional) charges brought, and, of the partial (biased) performance of the Intenational's appointed trial committee in the May 1984 hearing itself, Judge Harmatz concluded:

> Substantively, the charges above were either stale, based upon events approved and condoned by the membership, totally unsubstantiated, or disparately invoked. They were the byproduct of the type of scant investigation frequently found in pretext cases. The sham is also evident from the performance of the trial committee, which, shepherded by Almeida, seemed to reject any pretense of impartiality. In this latter regard, the trial committee reflected a clear propensity to rule at every turn against the accused, often at the expense of established guidelines, guarantees set forth in the IAM constitution, and basic considerations of fair play. *Id.* 995-996.

Solely *excepted* were identical charges that Almeida and dlr Romegialli apparently filed at a union meeting held

on 18 March 1984 charging Gilbert (as was Alta Moran earlier):

> [W]ith violating the Grand Lodge Constitution Article L, Section 3, by his refusal of a valid directive by Local Lodge No. 707 President Nixon and Labor Representative Rovegialli (sic) on February 22, 1984 when he did knowingly and forcibly assist Sister Alta Moran in the removal of a desk containing: files, documents and records, property of Local Lodge No. 707 from the Local Lodge Office.' (footnote omitted) *Id.* 989.

In that respect, Judge Harmatz observed:

> [W]hile the aforesaid unfair labor practices will only be purged by disbanding the trial committee as it is presently constituted, evidence offered in support of one of the charges tended to disclose misconduct on the part of Alta Moran and Wayne Gilbert, which if credible, under appropriate circumstances, might well warrant internal discipline. Thus the written charges concerning removal of the desk containing property belonging to Local 707 reflect contemptible behavior, having no casual relationship to the distribution of campaign literature in December 1983.
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> In addition Wayne Gilbert was present on February 22 and actively assisted Alta Moran in removing the desk after admittedly hearing Romegialli state, 'The desk can't leave here until it is checked as to whether or not there is records.' Thus the evidence tended to establish Gilbert's complicity, albeit to the limited extend of cooperating with removal of the desk in the face of directives by union officials. On that basis, he too joined an act of defiance toward what at least arguably was a reasonable effort on the part of Local 707 to protect its records or property. Action of this type on the part of a member would not

escape attention of internal disciplinary machinery, even if there had been no protected activity. Accordingly, the 8(b)(1)(A) findings herein are not to be construed as including or based on the alleged misconduct growing out of the February 22 confrontation concerning access to Alta Moran's desk and the Local's legitimate interest in protecting its property. *Id.* 996-997.

The Board adopted Judge Harmatz's recommended remedial order that International and LL 707, *inter alia*, cease and desist from filing and processing internal disciplinary charges against any employee under conditions constituting a repisal for participation in activity protected by Section 7 of the Act; and affirmatively, nullify any findings, recommendations, or remedies made by the trial committee, disestablish that body, and disqualify all its participants from presiding in the future in any internal disciplinary proceeding involving the Charging Parties. *Id.* 997.

Respondent unions (accurately) observe in brief that the unlawful conduct in the above case consisted of various acts *beginning in December 1983* and extending through the intraunion trials held in mid-May 1984. Notably, Respondent unions also assert in brief that following Board decision in the matter (30 September 1985) that LL 707 (and International) has (have) taken all necessary action to comply with the (first) remedial order. The General Counsel has made no contention to the contrary.

That compliance, however, was well after LL 707 had filed its "Verified Complaint" in the State court on 7 December 1984. Though Judge Harmatz's determination (16 January 1985) recommending complaint dismissal as to DL 91 occurred prior to DL 91's alleged unlawful failure to recall Gilbert to a labor representative position that opened shortly thereafter, on and after 11 March 1985, further charges, *inter alia* against DL 91, had been

heard before ALJ Lawrence, and they were pending his decision. In that regard, Judge Harmatz was aware that LL 707 had stripped Gilbert of membership in August 1984, a few days before his hearing, but observed it was not challenged by allegation or litigation before him; and it was thus not an issue reached by him.

ii. *The second prior consolidated proceeding*

The issues of LL 707's lapse of Gilbert's membership, and International and DL 91 approval, were challenged in consolidated complaint of 19 October 1984 heard before Judge Lawrence on 15 November 1984. (Respondent's related assertion that with both cases heard and unresolved at time of LL 707's filing of the State Court action, in December 1984, that LL 707 was walking on eggshells, has some factual base of support.) On 10 June 1985, Judge Lawrence issued his decision in which he found that *all* the Respondent unions had violated Section 8(b)(1)(A) in that regard, a determination since adopted by the Board, as found at 278 NLRB No. 8 (16 January 1986). The Second Circuit Court of Appeals has now enforced in full the Board Order entered therein, *NLRB* v. *Machinists, Local Lodge No. 707, etc.*, Docket No. 86-4144, Decided April 29, 1987.

The Board has thus adopted, and the Court now enforced, Judge Lawrence's central finding that LL 707, DL 91 and International have:

> . . . individually and collectively, violated Section 8(b)(1)(A) of the Act by cancelling the union membership of Wayne A. Gilbert and approving said cancellation, without prior notification to Gilbert, in the process thereof jeopardizing his employment and violating their fiduciary duty toward him as a member of the union and an employee in the bargaining unit represented by them, because they acted solely by reason of the fact that he engaged in internal union activities by distributing election campaign leaflets to

> members of Local Lodge No. 707 critical of the incumbent administration and because he filed unfair labor practice charges against Respondents and testified against them at a hearing conducted by the National Labor Relations Board. 278 NLRB at ALJ Dec. p. 22.

In general sequel to Judge Harmatz's addressment of union conduct from December 1983 through May 1984, the consolidated complaint heard by Judge Lawrence has caused addressment of union conduct (essentially) occurring between April and November 1984. (The State Court lawsuit issues involves related conduct in period August-November 1984.) The basic issue however, centered on a lapse of Gilbert's membership in LL 707, made retroactive to May 1984, but *first announced* and enforced by LL 707 on 19 August 1984, and shortly thereafter (formally) reported to International (on 22 August 1984). Respondent Unions asserted before Judge Lawrence that the same was accomplished because of Gilbert's improper purchase and/or use of unemployment stamps for the period June through September 1984. However, Judge Lawrence subsequently determined that all the unions had acted, in the matter of lapse of Gilbert's membership, with unlawful motivation. The issues were becoming more complicated.

Gilbert's use of unemployment stamps in 1984, as raised in issue before Judge Lawrence is not to be confused with earlier internal union charges covering asserted December, 1982 and June-July, 1983 unemployment stamp incidents which were earlier addressed by Judge Harmatz and determined by him to have been *wholly* unfounded. Thus, in the first consolidated proceeding, Judge Harmatz determined that International had asserted jurisdiction over, *inter alia*, a (later) advanced charge that Gilbert had improperly received unemployment stamps. As read by Almeida to the Trial Committee in Gilbert's (16 May 1984) hearing, charges against Gilbert included: "3. Ac-

ceptance and fraudulent issuance of unemployment stamps when not eligible for same." Judge Harmatz concluded in that respect and with notable reference to a prior DL 91 June layoff of Gilbert), as follows:

> (2) The half-baked effort to 'get' Gilbert was also marked by the charges based upon his alleged fraudulent use of 'employment stamps.' Under union policy, those unemployed for a major portion of the weeks in a month are only required to pay 50-cents dues. Dues for such periods will be refunded to those eligible who are on checkoff. To signify such status on internal records, an 'unemployment stamp' is placed on the dues card of members of Local Lodge 707. Among the formal charges against Gilbert was an allegation that he improperly received an unemployment stamp during the month of December, 1982. Before the Trial Committee, the case against Gilbert in this respect was tied together by evidence that a check had been issued to him covering a $19.20 refund of dues for December 1982. In fact, the refund check described under oath before the Trial Committee as having been issued to Wayne Gilbert had not been issued to him at all but was in fact payable to another member 'Wilbert Gilbert.' This discrepancy is difficult to understand. Almeida confirmed that Gilbert, prior to the trial, in April 1984, informed Almeida that he had not received an unemployment stamp and had paid his dues in December 1982. Apparently, Almeida in his zeal, not only misidentified the check payable to another member, but neglected to verify whether a dues refund to Gilbert had been recorded in Local 707's cash disbursement ledger for that month. (References to Fns. and exs. omitted.)
>
> * * * *
>
> (4) With respect to allegations that Gilbert fraudulently received unemployment stamps for the month of June and July 1983, Local 707's dues records

> showed that Wayne Gilbert paid full dues for the month of June. As for July 1983, uncontradicted testimony by Gilbert indicates that on March 16, 1984, the Trial Committee and Almeida during investigatory stages were informed that he had been laid off from his job as District 91 representative and hence was entitled to reduced dues status at that time. Despite the earlier revelation, the charges were maintained even though no evidence was ever offered to the Trial Committee to refute Gilbert's stated explanation of that incident. (Fn. and Exs. references omitted.) 276 NLRB at 993.

Essentially, on 19 August 1984, LL 707 lapsed, and DL 91 approved the lapse of Gilbert's membership, (as did International approve same on 5 October 1984). These events occurred in context of Gilbert running for three offices in LL 707, with nominations to be made in September, and elections scheduled for 17 October 1984. Judge Lawrence relatedly found:

> Under the Bylaws of Local 707, a person must be a member in order to hold any office or any position in which he represents Local 707; to run for office, he must be certified as qualified by the Financial Secretary. In order to be certified, he must attend at least 50% of the regular Lodge meetings in the year preceding the date of nomination. In short, he must be a member in good standing.

As observed by Judge Lawrence in that regard:

> Gilbert . . . has had his status as a member challenged which precluded him from running for union office. The gravamen of Gilbert's complaint herein is that his membership was lapsed because of his intra union activities and filing of charges with the Board, and that one result of Respondent's actions was to imperil his employment with Pratt & Whitney. 278 NLRB at ALJ Dec. pgs. 3, 21.

While Gilbert worked for DL 91 as a dlr, Gilbert maintained his membership in LL 707 by continuing to pay his full dues through June 1983, at which time he was laid off; and thereafter began using unemployment stamps. In addition to ALJ Harmatz' finding of a DL 91 layoff of Gilbert (on uncontradicted evidence), and in contrast with Judge Lawrence's relation of receipt of a stipulation before him, *inter alia*, (also) referring to prior DL 91 layoff of Gilbert, DL 91 advances contention before me that Gilbert's actual DL 91 employment status at the time was one of resignation from DL 91 employment, not layoff, a matter strenuously litigated by the parties in this proceeding, discussed *infra*. Insofar as additionally pertinent Judge Lawrence found that on 18 March 1984, after an (apparently interim) temporary job had ended, and before Gilbert had obtained a second (NAGE) job on 7 May 1984, that Gilbert had purchased unemployment stamps which continued his membership in LL 707 during April and May; and, that on 10 April 1984 (still prior to obtaining the NAGE job), Gilbert had similarly purchased stamps that covered him for the months of June and July 1984. On 27 July additional stamps were purchased that covered Gilbert's dues for the months of August and September 1984.

Respondent Unions advanced related contentions before Judge Lawrence (*inter alia*) that Gilbert's purchase and use of unemployment stamps was improper after 7 May 1984 when Gilbert had obtained full time (NAGE) employment. In that *very* respect, and contrary to urgings advanced by Respondent Unions in brief to Judge Lawrence that the other parties were concertedly seeking to obfuscate the real issue in the case, *viz.*, that: "Gilbert applied for and received unemployment stamps under false pretenses," Judge Lawrence contrarily held:

> That is not at all the 'real issue.' The real issue is whether Respondents acted for the reasons they alleged or because of motivations proscribed by the Act. The actions taken by Local 707 are claimed by the

> Respondents to have been taken in conformity with the rules and practices of the Local and the International, a contention which is not borne out upon examination of the International Constitution and Bylaws of the Local. In any event, the Respondent failed to present any substantial showing that their actions were motivated by fraudulent conduct on the part of Gilbert. There is very substantial evidence that other motives were operative, all of them unlawful. (Case cited omitted.) 278 NLRB at ALJ Dec. p. 6.

Judge Lawrence thereafter concluded and found that Respondent LL 707 was unlawfully motivated in the lapse of Gilbert's membership, as were International and DL 91 in their approval of LL 707's lapse action taken against Gilbert. In addition to (stated) reliance upon the unions' hostility to Gilbert as theretofore determined by Judge Harmatz, Judge Lawrence found several other factors were supportive of the unions' (continued) unlawful motivation.

The charge centrally brought against Gilbert, as determined by Judge Lawrence, was one of fraudulent misrepresentation in Gilbert's procurement and use of stamps for the period May-September 1984. Judge Lawrence found however, that Gilbert had earlier sent a letter, dated 26 April 1984, in which Gilbert requested an (internal) trial date change to a weekend with (openly) stated reason for the requested rescheduling being because of employment requirements of his "new employer" who was not a part of International. Although this letter was addressed to a Machinist District 1 official, Gilbert had sent a copy of it to an International official. Moreover, although the letter was not addressed to nor copy sent to LL 707, this letter was read to the Trial Committee (in the May hearing) in the presence of LL 707's acting financial secretary White. Judge Lawrence specifically found that White later acknowledged that was how he had

first learned of Gilbert's employment. Judge Lawrence concluded therefrom that Gilbert did not conceal his new (NAGE) full-time employment; and further, that Gilbert's new employment had become in fact known shortly thereafter to *all* of the persons to whom such information was supposed to be directed. In short, a fraudulent misrepresentation on Gilbert's part was not deemed shown sustained. Nor were the Unions to be deemed in any sense unaware of the development that Gilbert had obtained the new employment.

Judge Lawrence relatedly found that in June, 1984, LL 707's acting financial secretary White and Grand Lodge (International) representative Almeida had plainly discussed over the phone "what action was to be taken with respect to a member who bought unemployment stamps when he was working full time." Almeida asserted that White had called him; that White told Almeida that Gilbert had been receiving stamps *fraudulently*; that White wanted to know how to treat it; that Almeida (only) told White that "White should treat Gilbert no differently than any other member." Almeida also ". . . denied any advanced knowledge that Gilbert's membership was going to be lapsed." Judge Lawrence however found Almeida in this matter had testified in a manner which ". . . failed to inspire confidence.", and that Almeida's account contained (enumerated) inconsistencies, amongst which I only note here that Judge Lawrence found unconvincing an Almeida assertion that he did not know before then that Gilbert was getting stamps while employed full time. (Almeida had acknowledged his own prior awareness of the "new" employment of Gilbert and, Almeida had attested to his personal view at the 16 May hearing of Gilbert's dues card which showed stamps purchased through July.) Judge Lawrence further observed that Almeida's testimony did not square with that of White; was vague in parts; and had discernibly shifted in its base of charge from a Gilbert misrepresentation at

time of stamp purchase, to a claim that Gilbert had failed to report his interim employment; but, that neither assertion squared with, or explained otherwise established events and/or actions of White on 27 July 1984.

In later analyzing International responsibility, and upon addressing offered and *uncontested* transcript evidence from Judge Harmatz's proceeding, and other evidence otherwise presented before Judge Lawrence, Judge Lawrence (notably) concluded therefrom that Almeida, acting on behalf of the Grand Lodge (International) had deliberately acted to silence Gilbert, and that Almeida engaged in an outright campaign to oust Gilbert from the Union with stated reliance on Almeida's prosecutorial acts before the Trial Committee (as found by Judge Harmatz) and (later) contacts with other union bodies as evidenced before Judge Lawrence.

In regard to a confirmed element of Almeida direction for Gilbert treatment (*viz.* that it be like any other member) in the accounts of both Almeida and White of their conversation in June 1984, Judge Lawrence concluded:

> [T]he idea that Gilbert should be treated like any other union member is one that is hardly likely to have occurred to either White or Almeida. Their problem with Gilbert lay precisely in the fact that he was not like any other union member. After a lengthy history of union activity, he was now a dissident conducting a strenuous campaign to oust the incumbent officers. This conversation, supposedly in June, was taking place after a chaotic period in which charges and countercharges had been filed, in the union and in the National Labor Relations Board, and the union leaders had theatened (sic) to institute civil suit against Gilbert on account of statements contained in the leaflets. The noise Gilbert was making was being heard far beyond the confines of Local 707. The very subject of their telephone conversation

was one that distinguished him from the rest of the membership, for he had raised a novel issue as to whether a member was entitled to buy unemployment stamps if he obtained full time work in a temporary position in another industry, pending reinstatement at Pratt & Whitney. (278 NLRB at ALJ Dec. p. 20.)

Judge Lawrence (affirmatively) found that by 27 July 1984, it was generally recognized by LL 707 and International officials that an issue existed as to Gilbert's right, while so employed outside the industry, to purchase unemployment stamps instead of paying the full monthly due; and, the matter was then under study at the International's headquarters. Judge Lawrence more specifically found in that regard:

> On the morning of 27 July, Jean Moran purchased unemployment stamps for Gilbert for the months of August and September. White personally handled the transaction. Gilbert came in later in the morning, and he and White had a conversation in which they discussed the fact that the International was examining the question of his entitlement to them and would advise him directly of their conclusion. Through all of this, White never asked Gilbert to pay his full dues, either on July 27 or at any other time. Moreover, there was never any discussion of the recognized procedure applicable to persons employed outside the industry. Nicholas Busceni, an experienced Grand Lodge auditor, testified that the proper procedure for Gilbert to have followed would have been to take out a "withdrawal card," which would entitle him, when he again obtained employment in an IAM shop, to restore his full membership simply by paying $10 plus the month's dues. Neither White nor any other officer of the Local suggested that course to Gilbert. Instead White, as Acting Financial Secretary, personally allowed Gilbert to purchase un-

employment stamps for the period of August and September (advance purchase of such stamps being a common practice in Local 707 though not sanctioned by Grand Lodge) and took no action on the basis of Gilbert's subsequent purchase of stamps to cover himself through October.

* * * *

Gilbert had asked Jean Moran to pay for his unemployment stamps for August and September but, because she had not been sure she would be able to get to the union offices, he went there himself at about 9:30 a.m. on 27 July. Dean White told him Moran had already paid and had been given a receipt. Gilbert asked White to stamp his dues card, which he did. (278 NLRB at ALJ Dec. pp. 6-7.)

* * * *

Judge Lawrence also resolved certain conflict between Gilbert and White as to their conversation held on 27 July 1984, crediting Gilbert's account over White's because of a number of inconsistencies and discrepancies found in White's testimony which need not be repeated here. However, Gilbert's (thus credited) account of their discussion (essentially) confirmed that White had told Gilbert on 27 July 1984 that there might be a problem with Gilbert's dues payment; and that his due payment with unemployment stamps was being investigated by Washington, meaning the Grand Lodge. Gilbert (immediately) inquired of White whether Gilbert was going to be treated differently from a thousand or so other employees laid off by P&W; and (basically) said if so, "it would be a discriminatory type act." White responded he was not there to argue; and (also) said this matter's out of my hands. Gilbert rejoined that he wasn't there either (to argue); that he was just trying to get the issue clarified; and Gilbert asked White if he would be notified of the outcome. White told Gilbert he would be notified from them, referring to the Grand Lodge. How-

ever, Gilbert thereafter received no advance notification of a lapse of his membership in LL 707. 278 NLRB at ALJ Dec. pp. 7-8.

Judge Lawrence concluded therefrom that White's 27 July 1984:

> . . . actions indicate that he had not, at that time at least, come to the conclusion that Gilbert was not entitled to the stamps and they also took no cognizance of the existence of a form in the Financial Officers' Reference Manual of the International which furnishes a form for a Notice of Arrearage. No written notice was ever sent to Gilbert, nor even to the Grand Lodge. Nothing about a lapse of Gilbert's membership appeared in writing until White reported it, among other items, in a letter to Eugene Glover, the General Secretary-Treasurer, dated 22 August. (278 NLRB at ALJ Dec. p. 10.)

In the interim Gilbert found out what was to be *LL 707's position* on his membership payments for the first time at LL 707's meeting of *19 August 1984*. As to that meeting Judge Lawrence found:

> At the outset of a general membership meeting of Local 707 on Sunday evening, 19 August, the question of Gilbert's status was raised by Dean White, who, in his capacity as Acting Financial Secretary, advised the president that Gilbert had defrauded Local 707 by purchasing unemployment stamps while he was fully employed. The Lodge president ruled that Gilbert was not a member in good standing and therefore could not remain in the meeting. Gilbert left the meeting, but returned later and was permitted to remain. Three days later, on the same day Gilbert testified in the unfair labor practices hearing, White sent a letter to Eugene Glover, the General Secretary-Treasurer, advising him that Wayne Gilbert "has been lapsed on the Grand Lodge Report as

> of May, 1984 . . . for not paying full dues—when by his own admission, he has been fully employed since May 7, 1984, outside our Union's jurisdiction. (278 NLRB at ALJ Dec. p. 4.)

Nilson was still the president of LL 707 at this time. Nixon did not begin acting as president until 4 September 1984, following Nilson's resignation. The referenced date on which LL 707 formally committed its position in writing to a lapse of Gilbert's membership in LL 707 (albeit made effective back to May), is clearly earlier, on 22 August 1984, which is also the first day of hearing, of the first consolidated proceeding heard before Judge Harmatz, and at which Gilbert appeared and gave testimony against Respondent LL 707 (and Respondents DL 91 and International). As is also apparent however, LL 707 had also announced and enforced its position earlier, at its general meeting of 19 August 1984, a meeting at which LL 707 (now) asserts (before me) Gilbert commenced being disruptive of that union's conduct of its business affairs, discussed *infra*. LL 707's further claim is that Gilbert's continued disruptive conduct at subsequent meetings and/or at the union hall directly lead to LL 707's effort to enjoin Gilbert in the State Court action brought in December, 1984.

Subsequent events in 1984 thus material to issues before me, insofar as chronicled by Judge Lawrence are as follows:

> The agenda of the next meeting of Local 707, held on 16 September, included nominations for several offices in the Local. The elections were scheduled for 17 October at the next membership meeting. Gilbert was a candidate for three offices, including Chief Safety Representative. At the meeting he delivered a letter, addressed to Dean White as Acting Financial Secretary, asserting that he was a member in good standing, reciting the history of his dispute with the incumbent leadership and pointing out, *inter*

alia, that normal procedures relative to nonpayment of dues had not been followed in his case and that he had received no formal notice of lapse of his membership. He sent a copy of the letter to William Winpisinger, president of the International. Nevertheless, Gilbert was ruled ineligible to run for office. On 19 September, he sent a telegram to the International president in which he requested that the Local be directed to retain his name on the membership rolls and allow him to be a candidate for office in the Local. In the telegram, he alluded to the copy of his letter to White which he had previously forwarded.

On 21 September, Dean White sent Gilbert a letter returning the sum of $2.50 paid by Gilbert for unemployment stamps for the months of May through September, on the ground that he was ineligible because he was employed full time outside the Local 707 jurisdiction.

On 10 October, Gilbert sent letters to White and Winpisinger. In the letter to White, he again tendered payments of the unemployment stamp fees, along with payment, under protest, of the balance of his regular dues. In his letter to Winpisinger, he requested that Winpisinger delay the elections in the Local, scheduled for 17 October, and convene a special trial committee to try White and other Local 707 officers for denying him the opportunity to run for office without proper adjudication of his membership status. He brought the International president up to date, informed him of the tender of dues, lectured him on the interpretation of the International Constitution, demanded his intercession and threatened that legal action would result if a favorable response to his requests was not received by a given deadline. (278 NLRB at ALJ Dec. p. 4.)

However, in the interim, on 5 October 1984, the International had approved LL 707's lapse of Gilbert's membership. In addressing and finding unlawful motivation on the part of LL 707 and International, Judge Lawrence early concluded:

> Both White and Almeida were defensive with regard to the basis for the action finally taken by White, and with good reason. At the time White lapsed Gilbert's membership, he knew that an arbitrator had rendered a decision favorable to Gilbert, directing his reinstatement, which the Union was seeking to enforce in court and the effectiveness of which might depend on his superseniority status. He knew Gilbert was an interested, active Union member with no intention of knowingly quitting the Union (which I believe was the very core of the problem, so far as the incumbent officers were concerned). White knew also that Gilbert was making an issue of his right to purchase unemployment stamps when he had employment outside the Union's jurisdiction, even if it was full time employment. White was well aware that the case was one of first impression which was under study at the International. White himself had permitted Gilbert to purchase unemployment stamps. Finally, there was a serious legal impediment to White's action and I cannot believe he was unaware of it. There is no constitutional provision for lapsing a member because he improperly purchased unemployment stamps, and under the Bylaws of the Local he could not be lapsed simply on the basis of being in arrears in payment of dues without notice of arrears being served upon him. (278 NLRB at ALJ Dec. p. 10)

* * * *

In conclusion, I find that too many factors weigh too heavily against the Respondents' attempts to portray their action against Gilbert as routine enforce-

> ment of the Respondents' Bylaws and Constitution. Besides the serious problems which affect the credibility of the Respondents' witnesses, the rigidly formal punitive action taken against Gilbert must be considered in the light of the hostility which existed between the incumbent officers of Local 707 and Gilbert as a result of his participation in the campaign against them which they regarded as a campaign of vilification; of the animosity evident in their personal confrontations; of the fact that the actions taken to lapse Gilbert's membership were taken without notice to him, tardily, and only after a long period of knowledgeable acquiescence in the condemned conduct; of the failure on the part of the Respondents to ensure that action against Gilbert was taken in conformity with the Constitution of the International and the Bylaws of the Local, especially since any irregularity under these circumstances raises serious questions of motivation; and of the timing of the action, which invites the reasonable inference that it was taken to prevent Gilbert from running for office in Local 707. (278 NLRB at ALJ Dec. pp. 15-16.)

In addition to reliance on the institutional structure existing between International and LL 707, Judge Lawrence relied on conduct of Almeida as International's representative as previously determined by Judge Harmatz, and otherwise by Judge Lawrence as noted above. With regard to the International's responsibility in the lapse of Gilbert's membership, Judge Lawrence further observed and concluded:

> The Respondents admit the allegation of the consolidated complaint that the International, acting through Eugene Glover, adopted and approved the retroactive cancellation of Gilbert's union membership. This was not just a ministerial act. In passing on it, the International reviewed the whole question of entitlement to unemployment stamps, knew

> Gilbert's situation was a case of first impression, and, regardless of whether Gilbert was right or wrong, could not have acted as it did unless factors other than the immediate issue were in mind. This explains Almeida's conduct in October, when following the official approval by the Grand Lodge of the cancellation of Gilbert's membership on 5 October, Almeida participated in a campaign to sever the links between Gilbert and other labor organizations with which Gilbert was connected. The president of Local 707, Nixon, sent a letter to Frank Carrano, the president of the Connecticut State Labor Council, AFL-CIO advising him that Gilbert was no longer a member of the Local or the International and that, since he did not speak for the Local or of the International, he should be relieved of any Council offices held by him. Gilbert was also Executive Vice President of the Connecticut State AFL-CIO. Almeida personally visited John Driscoll, its president, showed him a copy of Nixon's letter to Carrano, and requested that Gilbert be removed from office as Executive Vice President. (278 NLRB at ALJ Dec. p. 20.)

The case against DL 91 however, rested on more limited factual base, as Judge Lawrence thus found, and Board majority upon its review adopted [2]:

> The case against District 91 rests upon the fact that its representative, Andrew D. Romegialli, was present during the meeting of Local Lodge No. 707 on 19 August, when the officers took significant action prejudicial to Gilbert by depriving him of his status

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[2] In this connection 278 NLRB No. 8, fn. 1 in pertinent part provides: "Chairman Dotson would find the evidence—District 91's authority to control certain activities of Local Lodge 707 and the mere presence of District 91's representative at a Local Lodge 707 meeting at which action was taken against the Charging Party—as insufficient to make the district liable for the local's conduct." (Case cited omitted.)

> as a member in good standing. At the end of the meeting, Gilbert asked White for confirmation that the dues question was under investigation and was told by White that he had to go through channels, whereupon Gilbert wrote out a request to Henry Jackson, the recording secretary. These events are of such importance that any ambiguous action or failure to act in relation to them by the District or the International, with knowledge of the facts, could be construed as approval of the actions of the Local Lodge. Romegialli was present throughout the meeting as a representative of the District. It is an uncontroverted and admitted fact of the case that he was there on business and was an agent of the District. He observed the goings on and knew the people involved and the significance of the events he witnessed. He said nothing and did nothing about them, either then or later. Consequently, in addition to and aside from the Constitutional authority vested in the District over the affairs of the Local Lodges, I find that District 91 approved of and participated in the actions of Local Lodge No. 707 and must bear responsibility along with the Local.

However, as related to LL 707's designation of Gilbert as *its* safety representative, Judge Lawrence also (materially) concluded and found:

> In the circumstances of the present case, the Respondents are chargeable with actual knowledge that their actions could result in the loss of Gilbert's employment at Pratt & Whitney by reason of his loss of superseniority. The parties have stipulated that Gilbert was terminated by Pratt & Whitney from his position at the North Haven facility on 1 July 1982; that he was ordered reinstated by an arbitrator on 7 September 1983; that in the interim Gilbert was designated third shift safety representative at that facility by Local 707 on 2 June; that on 3 June 1983,

an economic layoff occurred; and that the layoff 'would have resulted in the layoff of Gilbert had Gilbert been working in his prior position at that facility without holding a union position with superseniority.'

In advance of the arbitrator's decision, Pratt & Whitney took the position that the appointment would not be recognized, since he was no longer an employee. The arbitrator having rendered a decision favorable to Gilbert, his reemployment in spite of the layoff may depend upon whether he has the status of safety representative to which he had been designated or whether he can get himself elected to another position which would give him superseniority.

* * * *

No amount of sophistry on the part of the Respondents can get around the fact that their attempt to expel Gilbert could have cost him the superseniority necessary to save his job. A written stipulation of facts which the parties placed in evidence concludes with the Respondents' promise that if the pending District Court suit results in Gilbert's reinstatement, his non-membership in the Union will not be used as basis for removing him from the safety representative position. Though the promise is couched as a statement of fact by the assertion that the statement constitutes the "position" of Local 707, I read it literally as a promise, not as a stipulation of fact. It does not, therefore, serve to refute the showing made by the General Counsel that the deprivation of his membership in Local 707 tended to deprive Gilbert of his employment. The promise to behave lawfully in the future does not exonerate the Respondents from their past violations of the Act. (278 NLRB at ALJ Dec. p. 21.)

It is further warranted to observe that Judge Lawrence did not resolve whether Gilbert was actually right or wrong on the dues payment issue. Rather Judge Lawrence saw and determined the issue before him as one of unlawful motivation, or no, in these terms:

> Whether Gilbert was right or wrong in his contention that he was entitled to buy unemployment stamps is not the issue. The issue is whether the Respondents are to be believed when they point to his purchase of the stamps while employed in a full time job as the reason for lapsing his membership.

Moreover, upon finding to the contrary, and in thereafter addressing remedy, Judge Lawrence related:

> The General Counsel demands that the Respondents be ordered to cease and desist from violating their fiduciary duty by failing to provide what is termed "full notice" of cancellation by membership, but such a blanket direction is unwarranted. The Bylaws of Local 707 require notice only of dues arrearage in the second month. In the present case, I considered the failure of the Respondents to give notice of lapsing of his membership to Gilbert to be of evidential significance is (sic in) ascertaining the Respondents' true motivation for doing so. It was not, however, a violation of the Bylaws and did not constitute a violation of the Act.
>
> The General Counsel also demands Gilbert's reinstatement to membership retroactive to 1 May 1984 without payment of full dues for the period of his expulsion. I have noted, however, that the correctness of Gilbert's position respecting dues is not an issue in this proceeding. It was not litigated herein. I could not have presumed to make the determination for the parties. In any event, lawfully constituted authority in the Respondents' organization has made a determination of the issue. Their actions against Gilbert

were predicated on the holding that he should have been paying full dues since 1 May. The determination of dues obligations is within the province of the Union itself and there are no circumstances present in this case which make its exercise of that authority illegal. I cannot overrule its determination. Respondents' problems in the present case arose from their election to expel Gilbert on an ex post facto basis for altogether illegal motives. Accordingly, Gilbert's reinstatement must be conditioned upon his payment of all dues arrearages retroactive to 1 May 1984 and Local 707 must be directed to accept such payment, even if made under protest by Gilbert in order to protect his position in the event he chooses to litigate the dues issue further. (278 NLRB at ALJ Dec. pp. 22-23.)

Finally, Judge Lawrence, in "the complicated situation which exists in this case," declined to remedially order Respondents (there LL 707, DL 91 and International), as urged by General Counsel, to make whole Wayne Gilbert for any loss of pay and other benefits suffered by Gilbert as the result of the cancellation of his membership in LL 707, as 'that is not likely to be a helpful formulation." Rather, Judge Lawrence provided:

I accordingly recommend that the Respondent Local 707 be directed to recognize Gilbert as the third shift safety representative retroactive to the date of the Layoff, 3 June 1983. I shall further recommend that Gilbert be reinstated to membership retroactive to 1 May 1984, without prejudice to any privileges that would have inured to him by reason of uninterrupted membership status, upon his tender of all dues owing to Local 707, at the full rate, retroactive to 1 May, and that the Respondents notify all union agencies whom they had contacted respecting his membership status that such membership has been restored, and that the Respondents expunge from their records all

references contained therein to the cancellation of his membership and notify him that this has been done. (278 NLRB at ALJ Dec. p. 23.)

Remedial order provided by Judge Lawrence in his decision of 10 June 1985, adopted by the Board on 16 January 1986, and now enforced in whole by the Second Circuit provides, *inter alia*, that *all* Respondent Unions shall:

1. Cease and desist from:

(a) Rejecting tender of dues by Wayne A. Gilbert, retroactive to 1 May 1984, provided same is made in accordance with the terms of this Order.

(b) Taking any action to bar Gilbert from membership in Local Lodge No. 707 on the ground that he purchased unemployment stamps to cover membership during the period from and after 1 May 1984.

(c) Barring Gilbert from seeking elective union office in Local Lodge No. 707 on the ground that he is not a member in good standing by reason of purchase of unemployment stamps for the period from and after 1 May 1984.

(d) Refusing to appoint Wayne A. Gilbert to his former position as a third shift area safety representative at the North Haven facility of Pratt & Whitney or taking any action which would deprive him of superseniority by reason of his having engaged in intraunion activities.

* * * *

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Upon tender by Wayne A. Gilbert of payment of all dues owing retroactive to 1 May 1984, offer him immediate and full reinstatement to membership in LL No. 707 without prejudice to any rights, priv-

ileges and benefits to which he would have been entitled as of and since the date of the lapse of his membership, and reimburse him for any losses or expenses suffered by him by reason of the lapsing of his membership.

* * * *

(d) Appoint Wayne A. Gilbert to his former position as a third shift area safety representative at the North Haven facility of Pratt & Whitney, Division of United Technologies Corporation.

(e) Permit Wayne A. Gilbert to attend and participate in all general membership meetings of LL No. 707.

(f) Permit Gilbert to be a candidate for any elective office in LL No. 707. (278 NLRB at ALJ Dec. p. 24-25.)

III. The Alleged Unfair Labor Practices' Evidence

A. *The State Court proceeding brought against Gilbert in December 1984.*

1. The filing of 7 December 1984

LL 707 and it (then) president Walter Nixon brought a "Verified Complaint and Application for a Temporary and Permanent Injunction and Temporary Restraining Order" (Verified Complaint), dated 7 December 1984, against Gilbert in the Superior Court of the State of Connecticut, Judicial District of New Haven (State Court). Attached to the Verified Complaint were supporting affidavits signed by LL 707's president Nixon, its vice president Ronald Obier, financial secretary White, recording secretary Henry Jackson, health and safety representative Robert Lynes, and DL 91 dlr James Parent (then servicing LL 707). The Verified Complaint was certified to the State Court on 10 December 1984; and a

hearing on it was held on 14 December 1984 before Judge Ronald J. Fracasse. Attorney Barbara Collins of the law offices of J. William Gagne, Jr. represented LL 707 (and Nixon). Attorney Keith B. Gallant represented Gilbert. The General Counsel was not a party in the State Court proceeding.

2. The Verified Complaint's averments; related considerations

a. *preliminary view of contentions*

General Counsel urged at hearing before me that the Board should consider the State Court lawsuit in its entirety (seemingly only as brought in and resolved by the State Court). Charging Party stressed LL 707's animus background in bringing a clearly retaliatory and now failed lawsuit. In general, both General Counsel and Charging Party contended that LL 707's lawsuit was brought without any legal foundation, had no basis in fact; and that it was a sham and frivolous lawsuit, a mere pretext, with its only real intention to discourage and/or exclude Gilbert's exercise of Section 7 rights. Respondent LL 707 counterargued at hearing that apart from retaliation consideration, the lawsuit as brought had a reasonable basis in both fact and law, which it urges is efficacious as a defense to unfair labor practice allegation. At hearing Respondent LL 707 also raised a legal contention, one plead, but not pursued at State Court hearing, *viz.*, LL 707's lack of disciplinary authority over Gilbert, if Gilbert be considered as a nonmember of LL 707, should LL 707 prevail in its (then unresolved) appeal to the Second Circuit Court of Appeals. General Counsel immediately registered concern that Respondent LL 707 was in effect seeking to relitigate the lawsuit cause of action improperly before the Board, in its apparent attempt to add, a new and/or different theory of the action here; and the General Counsel urged at hearing that the Board's focus should rather be on what hap-

pened at the State Court hearing. The General Counsel would also limit the Respondent to the facts it presented to the State Court Judge. On the other hand both General Counsel and Charging Party have themselves contended at hearing that certain factual assertions of Gilbert misconduct, with contrary testimony proffered at this hearing. In contrast Respondent offered supporting and corroborative testimony, on same in instant hearing. Fundamental questions thus appeared to arise as to the proper scope of evidence submission on facts, and points of law to be addressed, in resolving the underlying complaint issues in Board hearing, wholly apart from considerations of rejection of any improper collateral attack on related matters previously determined by the Board in its prior consolidated proceedings.

b. *the averments, and supporting affidavits*

The "Verified Complaint" averred (contrary to Board subsequent finding) that defendant Gilbert is not a member of plaintiff LL 707; but it also averred generally that for the past several months Gilbert had attended numerous monthly meetings and created disturbances which had caused serious consequences in the conduct of LL 707's business.

i. *in regard to the union meeting of 19 August 1984*

The Verified Complaint averred more specifically that at LL 707's regular monthly business meeting held on 19 August 1984, Gilbert "improperly signed the Union (attendance) register as a member, when he was not a member; and also, that when chairperson (then Nilson) asked Gilbert to leave the meeting; Gilbert refused; that Gilbert thereafter argued with other members, during which arguments, Gilbert used profane language; and that Gilbert caused the conduct of normal union business to be disrupted for several minutes.

i. *the union meeting of 19 August 1984*

Viewed in composite, the attached affidavits offered to the State Court in support would relatedly import the following: LL 707 had a regular monthly business meeting scheduled for 19 August 1984. Prior to the start of the meeting (then) president and chairman Gary Nilson inquired whether everyone present was a member of the Union (Lynes affidavit). Financial secretary White said that Gilbert, a nonmember, had signed in as a member (Obier, White). Gilbert was told he was no longer a member in good standing of LL 707, and International (Jackson); and Nilson asked Gilbert to leave, since he was not a member (Lynes, White). Gilbert initially refused to leave; and, Gilbert said in loud argumentative language, that he had paid unemployment stamps, and he was a member (White). Gilbert argued loudly with Nilson about Gilbert's membership for about 10 minutes (Lynes). Nilson ruled that Gilbert was not a member in good standing (Obier). Then a district representative said that Gilbert knew the channels to go through, and should use them (Lynes). (To extent Respondent would rely on Romegialli's *instant* hearing contrary assertion (made without objection) as to presence of a glr at this union meeting, who handled the question, the same is to be rejected as an instance of improper collateral attack. Similar such attacks were repeatedly otherwise ruled improper. The short of it is, DL 91 had full opportunity to develop its case in that regard, in the prior proceeding before ALJ Lawrence.)[3] Gilbert then left the meeting (White).

Gilbert and two members (the Morans) left the meeting in order to prevent a quorum; and a count was made of those present to determine if there was a quorum (Obier). There was still a quorum so the meeting began; and Gilbert returned to the entrance of the hall (Lynes). The three (Gilbert and the Morans) later returned to the

[3] Instant hearing related testimony is shown in parenthesis.

meeting; and no issue was made of Gilbert's attendance at that point (Obier). Gilbert returned as a guest, though he did not sign the book as a guest; and Gilbert was allowed in as a guest in order for us to conduct the business meeting (White). (The Verified Complaint relatedly averred that persons other than members in good standing can attend a meeting as a guest of a member in good standing after approval by the rank-and-file upon voice vote.)

Gilbert became very augmentative and disruptive of the meeting; and Gilbert seriously hindered the conduct of the meeting: (1) by failing to comply with LL 707's rules regarding the need to be recognized by the chairperson before speaking; and (2) by interrupting other members who had been previously recognized to speak at the meeting (Jackson). During one discussion Obier stated an opinion contrary to that of Gilbert. Gilbert interrupted Obier; and Gilbert called Obier an asshole (Obier). Nilson ruled Gilbert out of order. Gilbert continued to make "loud comments" throughout the meeting (Obier). (At hearing Obier confirmed Gilbert's profanity directed towards Obier and otherwise testified that Gilbert was selective in who he interrupted; and that Gilbert would comment: "Is he for real; is he kidding; and is he serious?")

ii. *The union meeting of 16 September 1984*

The Verified Complaint next averred that plaintiff LL 707 held a meeting on 16 September 1984 at which Gilbert was again in attendance; and that Gilbert caused a disturbance which occasioned suspension of the normal business of the meeting.

Similar affidavit composite of this meeting reflects: LL 707 had its next regular monthly business meeting on 16 September 1984. Nixon, who began acting as president earlier on 4 September 1984, was (formally) sworn in as president at the 16 September 1984 meet-

ing; and Nixon thereafter presided over the meeting (Nixon). Gilbert was present at the meeting; and (at least at some point) signed the register *as a guest* (Nixon, White and Jackson). Present also at the meeting was a congressman whom the executive board of LL 707 had approved to speak to the membership at the meeting (White). The Congressman spoke to the membership and left. (There is some confusion in the affidavits as to exactly when the congressman spoke to the membership, and particularly with respect to whether it was before or after any Gilbert confrontation with officer(s) or member(s) of LL 707 (Jackson, White).) (Record evidence before me indicates the Congressman spoke first and left before the nominations confrontation.) After the congressman spoke, Alta Moran read a letter in Gilbert's behalf (White); and Gilbert coached other members to bring up his points (Lynes).

The business part of this meeting included a nomination of local officers, and an approval of proposed bylaws (Nixon). In general there were a number of Gilbert outbursts during the meeting (Lynes); and, throughout the whole meeting, Gilbert caused disruption by interrupting, and by making snide remarks and innuendos while other members were speaking (White).

More specifically, during the nomination portion of the meeting, and at a Gilbert direction (Nixon), there was an attempt to nominate Gilbert for the office of vice president; but president and chairman Nixon refused to accept the nomination, stating or explaining that Gilbert could not be nominated, since he was not a member in good standing (White, Obier). Nixon affidavit also recited that one reason that Gilbert was not a member in good standing was because he was not employed at Pratt & Whitney. (At instant hearing Nixon acknowledged his affidavit was incorrect in that respect. Nixon also conceded that an individual dlr did not have to be employed by P&W to be a member of LL 707; acknowledged that

he was aware of the Gilbert arbitration award of September 1983; and Nixon further conceded that a thus contested terminated employee would still be considered eligible for membership in the Union.)

Gilbert responded to Nixon's refusal to accept the Gilbert nomination for vice president in a "belligerent" manner (White). Gilbert began arguing that he was improperly notified of his status (Obier). Gilbert repeatedly insisted that Nixon show Gilbert some document that would indicate that Gilbert was not a member in good standing; and Gilbert did so in a loud and obnoxious manner that was very disruptive of the conduct of the business of the union meeting (Nixon). (At instant hearing Obier testified that Gilbert did not formally challenge the Chair ruling in this meeting. Gilbert just stood and continued to speak though the Chair repeatedly ruled him out of order.)

During the nomination process Nixon asked Gilbert to leave, but Gilbert did not, and the matter was not (at that time) further pursued (White). However, at some point during this meeting, Nixon informed Gilbert that because he was not a member, he could not speak unless the members in attendance voted by a two-thirds majority to allow him to speak, as required by the Union's constitution. Upon vote taken, the (required) majority for Gilbert to speak was not attained. Gilbert was told he could not speak at the meeting. Gilbert then became loud and abusive; interrupted other persons who were recognized by the president to speak; and became so disruptive and abusive that Nixon asked Gilbert to leave the meeting (Jackson).

Obier related (in affidavit) that he has been vice president since September, 1984. Whether before or after the above ruling that Gilbert could not speak, but seemingly after it, and after Gilbert had left and returned to the meeting, Gilbert interrupted and harassed Obier. Obier was reporting to the membership on certain proposed

amendments to the By-laws of LL 707. Gilbert began to repeatedly interrupt Obier, and to direct vulgar, profane and abusive language at Obier; on one or more occasions calling Obier an idiot; and Gilbert prevented Obier from presenting his report for approximately 10-15 minutes (Nixon, Jackson). Nixon requested Gilbert to leave the hall, but this time Gilbert refused (Nixon). Nixon proceeding with the business (at hand), because Nixon believed the meeting quorum would be lost and not regained if the meeting had to be stopped for a period of time (Nixon). (At instant hearing Obier testified that Nixon asked Gilbert to leave three times; that Gilbert just stood, with arms folded, and stared down the president; and that Gilbert refused to leave.)

iii. *The cancelled union meetings of 21 October and 18 November 1984*

The next regular membership meeting scheduled for 21 October 1984 was in fact not held, due to a lack of quorum (White).

The Verified Complaint further averred that Gilbert was at the Union's hall for the 18 November meeting, allegedly as the guest of another member, but that meeting also could not be held because of a lack of a quorum, and resultingly only an executive committee meeting was held. The Verified Complaint also avers however, that (because) of obnoxious language and abusive behavior which caused a disturbance in the hall, plaintiff president Nixon asked Gilbert to leave; that Gilbert refused to leave; that Gilbert was informed the police would be called; that the police were called; and, that the police report shows that Gilbert was requested not to return to the hall.

Similar composite of this meeting reflects: LL 707 scheduled its next regular meeting for 18 November 1984 (Parent). Gilbert was present at the hall and had signed

in to attend the meeting, *as a member* (White). Nixon cancelled the meeting for lack of a quorum (White, Parent).

After the meeting was cancelled financial secretary White went behind a counter in the Union's main (secretarial) office; and Gilbert and Alta Moran approached the counter. Gilbert began to examine the "Employer Service Records" (ESR), which are kept on file at the union office (Parent, Nixon). These contain information regarding classification, job codes and salaries of bargaining unit employees, both members and nonmembers. The records are confidential in nature; and ESR information is available for examination only by union officers, stewards and shop committeemen, not by union members (Nixon, Parent). At instant hearing LL 707 witnesses conceded practice whereby an individual could view the ESR, but not receive a copy, as Gilbert sought.) When Gilbert attempted to have a photostatic copy made of the ESR, Parent prevented it by instructing the person operating the copying machine not to do so (Parent).

Nixon then asked Gilbert to leave the union hall, but Gilbert refused to leave (Parent); and Gilbert called Nixon a f------ asshole. Nixon called the police, and requested that the police direct or order Gilbert to leave the premises; and only then would Gilbert leave the union offices (Parent). The police instructed Gilbert not to enter the union office or hall; to leave the premises; and not to return, or Gilbert would be subject to arrest (Nixon). (At hearing union witnesses conceded the police never took Gilbert into custody.)

Nixon affidavit also recites that president Nixon has "been informed by numerous members of LL 707 that they will not attend membership meetings because disruptions created by Wayne Gilbert prevented the orderly handling of union business" (Nixon).

iv. *The prospective union meeting of 16 December 1984*

The Verified Complaint then declares that the next meeting of LL 707 is to be on 16 December 1984; and, that by reason of Gilbert's actions, plaintiff LL 707 has suffered and will continue to suffer extreme hardship and actual and impending irreparable harm and damage, in that members are being deterred from attending meetings; LL 707 is unable to obtain a quorum at its membership meetings, and is not able to conduct business; and that plaintiff president Nixon is suffering hardship and irreparable harm in the performance of his job as union president. (At hearing Obier acknowledged LL 707 had had difficulties in attaining quorums in the past.)

The Verified Complaint accordingly declared that plaintiffs LL 707 and president Nixon have *no adequate* or *speedy* remedy at law because defendant Gilbert will not heed plaintiffs' request that Gilbert not attend meetings; and plaintiffs cannot be compensated by money damages for the inability to conduct a business meeting. Wherefore, the plaintiffs sought the temporary restraining order and injuction, restraining and enjoining, and the permanent injunction perpetually enjoining and restraining Gilbert from: *entering LL 707's hall; harrassing and intimidating members*, and *attending union membership meetings.*

An "Application" for the temporary restraining order and for preliminary and permanent injunction, filed separately but contemporaneously with the Verified Complaint, declared that unless restrained by the Court, defendant Gilbert will continue to commit the acts referred to in the Verified Complaint. It further declared that such action of Gilbert will result in irreparable injury in that plaintiff LL 707's effectiveness as a labor organization and plaintiff Nixon's ability to do his job will be destroyed, for all of which there is no adequate remedy at law; and the "Application" asserted that the State Court's issuance of temporary restraining order and a

preliminary and permanent injunction will not cause undue inconvenience or loss to Gilbert. Although Respondent in brief asserts no claim was made for damages of any kind, proffered pleadings received in evidence reflect a separate "Statement of Amount in Demand," exclusive of interest and costs was declared at "not less than $15,000."

At State Court hearing defendant Gilbert (by counsel) did not agree that Gilbert's conversation had disrupted the meeting of 19 August 1984, nor that at the meeting of 16 September 1984, Gilbert had overspoken to disrupt the meeting, contrarily urging that the chair ruled Gilbert out of order but once, and that interruption of the Chair was otherwise in course of debate. Defendant Gilbert by counsel did acknowledge that on 18 November 1984 Gilbert went to the counter and read the ESR, but with asserted purpose to see whether or not Gilbert's name was listed as an employee of Pratt and Whitney; and that the ESR was taken away from him to which he did not object. Gilbert by counsel did object to (plaintiff's) claim Gilbert was escorted out by the police, though Gilbert acknowledged (previously) being asked to leave and a refusal. (At hearing Gilbert essentially confirmed the above, though he asserts he wanted a copy of the ESR because of pay changes he had observed that he felt affected his position. Such records were made available to him through his attorneys' requests made of LL 707.)

2. The contentions made at State Court; discussion

In State Court pleading and hearing, plaintiff LL 707 continued a claim that Gilbert was not a member. However, at State Court hearing union counsel disavowed belief that Gilbert's membership status was the real issue. Rather union counsel took the position that LL 707 had the right to prevent anyone, whether union member or not, from attending its business meetings, if that person engaged in disruptive conduct. Thus, Union counsel explicitly stated,

> [T]he real issue in dispute is the conduct of the defendant (Gilbert) at the union member meetings, whether he be there as a guest or be there as a member, his conduct was so disruptive that he has disrupted the conduct of union business. (G.C. Ex. 3, pg. 20)

Union counsel specifically avowed that Union was not seeking to have the Judge determined whether Gilbert was a member or not, indeed again explicitly declared Gilbert's membership status is irrelevant to the issue of whether Gilbert violated codes of conduct to be obeyed by all at union meetings; and, ". . . so disrupted the membership meetings that business could not be attended to." (*Id.*, pg. 21). The Court then framed the issue as whether, apart from membership or guest status, Gilbert's ". . . conduct was violative either of the bylaws of the Union, the constitution of the union, or the general law." Union counsel argued for the need of State Court injunctive relief from Gilbert's (contended) likely continued violation of reasonable rules and regulations governing the conduct of internal union affairs as contained in the International's Constitution, and the Bylaws of LL 707, with an apparent intended reliance (see G.C. Ex. 3, pg. 26) on *N.L.R.B.* v. *Allis Chalmers*, (388 U.S. 175 (1967)).

In any event, in the above *Allis-Chalmers* case the Supreme Court held that a union does not violate Section 8(b)(1)(A) by fining employees who remain union members, for crossing the Union's picket line created to implement an authorized strike. The Court reasoned the Union's fines did not constitute 8(b)(1)(A) restraint and coercion because Congress did not intend the Board to intrude on internal union affairs through Section 8(b)(1)(A). However, soon thereafter, the Court would not uphold a union's enforcement of internal rules and regulations where exercised in manner so as to intrude upon important public right existing beyond the internal

affairs of the union, *N.L.R.B.* v. *Marine Workers*, 391 U.S. 418 (1968); and, in *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969) the Court expanded thereon, setting forth what now serves as basic guide for determining whether internal union rules and regulations are valid in that regard.

The *Marine Workers* case essentially involved an international union's attempt to enforce, by member expulsion, its own constitutional provision that imposed on a member a requirement to first exhaust, ". . . all remedies and appeals within the union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union." While the third Circuit Court of Appeals below had confirmed the Union could not penalize a member for filing a charge with the Board, that Court initially discerned the above union rule as a permissive one in giving the Union only a fair opportunity to internally correct its own wrong before the injured member should have recourse to the Board. However, at 391 U.S. 424-425, the Supreme Court, with prior stated agreement with the Board that ". . . the overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved"; and with affirmance of the Board on the difficulties and risk visited upon the member by such a union rule, a risk, characterized by the Court *inter alia* as, "likely to chill the exercise of a member's right to a Board remedy," the Court subsequently stated:

> [T]he proviso in § 8(b)(1)(A) that unions may design their own rules respecting 'the acquisition or retention of membership' is not so broad as to give the union power to penalize a member who invokes the protection of the Act for a matter that is in the public domain and beyond the internal affairs of the Union.

The *Scofield* case, *supra* essentially involved a union's enforcement of an external production incentive ceiling rate by internal fine and expulsion of members failing to abide by same. In *Scofield*, 394 U.S. at 430, upon review of the above *Marine Workers* case holding, the Supreme Court then stated:

> Under this dual approach, § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.

Gilbert's counsel continued claim at the State Court hearing that Gilbert was a union member, and essentially contended that Gilbert's conduct (as a member) as the union meetings was entitled to the full protection of the federal labor laws, with stated reliance on *Rollison v. Hotel, Motel, Restaurant, etc., Local Lodge 879*, 677 F.2d 741 (9th Cir. 1982); *Petramale v. Local Lodge No. 17, Laborers International Union*, 736 F.2d 13 (2nd Cir. 1984); and counsel urged as the controlling Second Circuit law (on member right to criticize incumbent leadership of the Union) *Salzhandler v. Caputo*, 316 F.2d 445 (2nd Cir. 1963), cert. denied 375 U.S. 946.

In the lead *Salzhandler* case, the Second Circuit had early ruled, in that respect,

> We hold that the LMRDA protects the union member in the exercise of his right to make such charges without reprisal by the union; that any provisions of the union constitution which make such criticism, whether libelous or not, subject to union discipline are unenforceable; and that the Act allows redress for such unlawful treatment.

In *Cole v. Hall*, 339 F.2d 881 (2nd Cir. 1965) the Second Circuit amplified:

> We think that the Salzhandler rationale—that union tribunals are not competent to apply technical doctrines limiting free speech—is equally applicable to the trial committee's additional finding that Hall spoke with malice. We hold that such a finding, whether or not justified as a matter of fact, does not allow a union to discipline a member for statements otherwise protected by § 101(a)(2).

In instant brief General Counsel argues that the *Rollison* and *Petramale* cases, *supra*, both rely on the *Salzhandler* case principle *supra*, and stand for the proposition that the free speech provisions of the LMRDA protect union members' criticism of union officers or members, even if such criticism is slanderous or libelous; and General Counsel in that regard (correctly) also notes that the *Rollison* Court has specifically held that LMRDA protects (such) conduct of union members *no matter how offensive that conduct may be to other union members.* I need not, and do not address the claim as indicated so broadly, *viz.*, as extending beyond LMRDA interdiction of union restriction upon member, vis-a-vis, aggrieved official lawsuit pursuit for slander or libel otherwise. See e.g., *Keefe Bros. v. Teamsters, Local 592*, 562 F.2d 298, 305 (4th Cir. 1977); and compare *Stark v. Twin City Carpenters District Council*, 219 F. Supp. 528, 533, 537 fn. 9 (D.C. Minn. 1963).

Otherwise considered, there is statutory and case warrant for ready conclusion that the Board's expressed view of such latter conduct as protected under the Act is the same, cf. *Steelworkers, Local 5163 (Bizzaro)*, 248 NLRB 943 (1980) where at 944 the Board broadly stated:

> The employee's Section 7 right to seek redress from the Department of Labor is as great as their right to use our processes and the protection from activity prohibited by Section 8(b)(1)(A) is the same. (Fn. 9 omitted).

General Counsel nonetheless has pertinently acknowledged that the Second Circuit in the *Petramale* case, *supra*, also *specifically* held that,

> [N]othing in the LMRDA prohibits a union from disciplining a member for actual disruption of a meeting. 736 F.2d at 17.

In the *Petramale* case, the Second Circuit however, admonished the union relatedly:

> Unions which institute disciplinary proceedings against members have no legitimate interest in making charges which allege protected conduct as an essential element and in creating a record in which valid charges—disruptive conduct—and invalid ones —accusations against union officers—are inextricably intertwined. If . . . [Local and International] . . . intended to discipline Petramale for disruptive conduct other than the accusatory content of his remarks, they should have separated both the charge and the evidence so that subsequent review by a trier of fact in a judicial tribunal was possible. Instead, charges of disruption and slanderous accusations were inextricably merged and the accusations themselves were considered disruptive by the witnesses who testified before the . . . [International] . . . Hearing Panel. Both the charges leveled at Petramale and the record created by the Union thus included protected speech as an indispensable element. It is altogether cynical now to seek to vary those charges and that record and to ask a trier of fact to draw distinctions which defendants themselves ignored. 736 F.2d at 18.

Gilbert's Counsel at State Court hearing had relatedly stated that defendant Gilbert did not dispute that the (there) specified applicable provisions of International's Constitution and LL 707's Bylaws (e.g. those governing conduct at meetings) met the required test of being rea-

sonable rules and regulations; but rather argued that the (plaintiff) Union *had to* follow internal (union) procedures in order to discipline a member, *first*, before coming to the Court for such extraordinary injunctive relief. Gilbert's counsel's argument as there essentially presented was, ". . . they haven't even followed their internal procedures which would permit them to come to Your Honor to seek some kind of extra union relief." While it does not appear that Gilbert counsel went so far as to contend the latter was jurisdictional to the Court, and the Court clearly itself and did *not* so view it, the Court did subsequently reveal its view of that consideration as an important factor to be weighed on the issue of the appropriateness of the Court's discretionary exercise of its own injunctive power. The Court thus posed the question to Union counsel directly, "Isn't the answer to that, if there is a disciplinary procedure that the Union may follow, isn't that an adequate remedy?" G.C. Ex. 3, p. 40. The Judge thereafter refined statement of the overall case issue before him as follows:

> The principal question here is the manner in which the Union meeting is to be conducted, the extent to which the Union may reasonably control the manner in which the meeting is conducted, and the remedies available to the Union with either a disruptive member or a disruptive person at the meeting. And if the defendant is not a Union member, there is a—appears to be to the Court, to be a clear remedy; the police may be there and told this person is not a member, he is not entitled to be here. If the Union wishes to press charges and to prevent him from entering, it may do so peaceably in that manner. If the defendant is a Union member, there is a Union procedure for handling that. And if in conjunction with that there's a need of calling the police, that's something that the Union members will have to decide for themselves.

> It doesn't appear, based upon accepting as true every act that is claimed to have been committed by the defendant on these three occasions, it doesn't appear that they even approach the kind of conduct that is described in the cases that I've been—that have been brought to my attention. (G.C. Ex. 3, pgs. 43-44)

In still further probing discourse with counsel, principally with union counsel, the Court heard additional arguments and made additional observations covering: LL 707's acknowledgment of availability of internal union proceedings for the Union to proceed both in an orderly way, and consistent with the objectives of federal statutes to permit freedom of speech to the extent Congress has imbedded the same in the labor laws; prior case holdings (generally) indicating the Court should not readily embark upon a course of supervising union meetings; a consideration of permissible, indeed (perceived) obilgatory action by the Union in the first instance, as constituting itself a substantial part of the federal statutes; addressment of union argument (found unconvincing) that the Court would effectively penalize the Union for its evaluation of the situation otherwise (seemingly for having proceeded on a perceived available alternative and more speedy remedial base); and with full consideration of union counsel's revealing and significant argument advanced in that regard, based on competing (protected) interests, as where the union, as representative of *all* members, feels:

> . . . —what they're dealing with is a situation whereby allowing Mr. Gilbert to continue to come to the meetings he is disrupting and causing the members not to come to the meeting, they have an obligation to go for an injunction as long as the situation is escalated, go and do something here and now. And the internal procedures are not set up for that kind of speed. (G.C. Ex. 3, pg. 48).

It was thus only after having fully addressed the issue and the positions of the parties, and reviewed the legal authority presented, the Court held:

> I don't really see much point in taking any additional testimony because in viewing the plaintiff's (LL 707's and Nixon's) claims and in light most favorably to the plaintiff, I find no basis upon which the Court should grant the application for temporary injunction. And, therefore, the application of temporary injunction is denied.
>
> But for the record, I will point out that the Court is appreciative of the efforts of counsel on both sides for giving the Court legal authorities and the legal claims that each side pressed and clearly focused on the problems and the issues in this case, and counsel are to be commended for doing a very professional job. (G.C. Ex. 3, pgs. 50-51.

The Judge thereafter granted judgment for Gilbert "after full trial," and the entire suit was dismissed. General Counsel correctly observes there is no evidence in the record that LL ever sought to appeal this judgment.

At hearing Obier testified that Nixon did not attend the subsequent 16 December meeting. Obier did, and he chaired the meeting. Gilbert signed in as a guest. A member question it. Obier testified that Mary Alice Moran challenged Obier before Obier even ruled. Nonetheless Obier relinquished the chair; and he and Moran spoke to the raised issue. Obier told the membership that he felt Gilbert shouldn't remain because Gilbert's conduct at the other meetings. Recording secretary Henry Jackson put the question to the membership; and the chair (Obier) was sustained. Obier then told Gilbert that it was the membership's wish that he not remain; and Gilbert then left. Neither Nixon or Obier ran for LL 707 office in 1985.

3. *Contentions of the parties before the Board*

General Counsel contends Respondent LL 707's filing of the December 1984 lawsuit against Gilbert in the State Court violated Section 8(b)(1)(A) of the Act. The argument advanced in support is essentially two-pronged: (1) the Union's nonmeritorious lawsuit had no reasonable basis in fact or law, and was retaliatory; and (2) the lawsuit was based upon Gilbert's nonmembership in the Union, which the Board has now found to have been caused by Respondent LL 707's unlawful expulsion of Gilbert, and thus the suit was based on an unlawful objective. In support the General Counsel argued there are two lines of cases, the one essentially of cases retaliatory in nature, and the second line of cases involving lawsuits which have as their basis an unlawful objective. It is General Counsel's basic contention that LL 707's lawsuit against Gilbert violated the Act under *either*, or both lines of cases. Respondent contends that LL 707's filing of this State Court action, albeit unsuccessfully, did *not* violate the Act because it had both a reasonable basis (in fact and law) and a lawful objective. I treat the urged two lines of cases separately.

a. *retaliatory case arguments*

In support of the first line of retaliatory lawsuits General Counsel (essentially) relies on *Power Systems, Inc.*, 239 NLRB 445 (1978), enf. denied on other grounds, 601 F. 2d 936 (7th Cir. 1979), which itself had distinguished Board holding in *Clyde Taylor Co.*, 172 NLRB 103 (1966).

In *Clyde Taylor, supra*, the Board had specifically affirmed a lower finding that, in context made, an implied threat of an employer to file a libel suit against certain employees because they filed charges, or unless the charges were dropped, constituted an unfair labor practice, in that the threat was of harassing nature, would

normally tend to intimidate an individual contemplating fiying a charge from doing so, or one who was filed a charge, to withdraw it. The threat thus operated to restrain employees in the exercise of their right to file charges under the Act. The Board thus concluded the threat was coercive, and violative of Section 8(a)(1). As to the actual bringing of the lawsuit, the Board in *Clyde Taylor* observed however:

> By this we do not mean to deny the existence of the normal right of all persons to resort to the civil courts to obtain an adjudication of their claims. We interdict here only the making of a threat by an employer to resort to the civil courts as a tactic calculated to restrain employees in the rights guaranteed by the Act.

Indeed, in *Clyde Taylor*, *id.* 109, the Board specifically dismissed an allegation that the employer had also violated Section 8(a)(1) by obtaining a State Court injunction banning peaceful picketing resorted to by a union in protest of employer's unlawful discharges of employees. In doing so the Board overruled its own earlier precedent of *W. T. Carter and Brother*, 90 NLRB 2020 (1950) (on which lower finding of violation was based) that rested on a rationale that the employer's resort to State Court, in a preempted area, was part of a bad faith scheme to defeat union organization. In the (overruled) *Carter* case *supra*, the Board had much earlier reasoned that an employer's *inter alia*, resort to court proceedings to prevent union meetings in a company-controlled town was a unfair labor practice, analagyzing, "The right of a person to resort to the courts is not absolute, but is limited, *inter alia*, by the law of malicious prosecution and wrongful initiation of civil proceedings." *Id.* 2023-2024.

In the *Power Systems case*, *supra*, the Board again found an employer violated the Act by filing a lawsuit against an employee. There the employer's lawsuit sought

recovery of legal fees incurred in defending an unfair labor practice charge filed by an employee, who had a history of filing charges (and grievances) against others, and who had recently filed a charge against (this employer. The employer also (initially) sought a *permanent* injunction to prevent the employee from *ever* filing another charge against the employer. Although the employee's charge filed against the employer was subsequently found by the General Counsel to be nonmeritorious, the Board determined that the (single) charge filed against this employer was *not* shown by the evidence to have been filed *without some probable cause, or with purpose to harass the employer.* Consequently the Board concluded that the employer had no reasonable basis to assert that the single charge the employee had filed against the employer was one filed without probable cause, or to harass the employer. Relatedly, the Board concluded that the nature of the employer's lawsuit as filed, in initially seeking a permanent injunction (although later dropped) was clearly one aimed at penalizing the employee for filing charges with the Board, and to prevent him from further assertion of rights under the Act or any other Federal or State statute. 239 NLRB at 448-449. As there observed by the Board additionally:

> . . . Respondent's lawsuit placed its employees on notice that if an employee files charges with the Board which are deemed by the General Counsel to be nonmeritorious that employee is subjecting himself to the possibility of a devastating lawsuit. In the instant case . . . [the employee] faced the prospect of having to reimburse Respondent for thousands of dollars in legal expenses if the state court upheld the Respondent's claim.

The Board however noted as being of even more significance, that even assuming the employee successfully defended the lawsuit, the employee had to retain private counsel to defend the lawsuit, and thus suffered a "sig-

nificant property loss as a direct consequence of his having filed a charge with the Board." As otherwise relatedly summarized by General Counsel in present brief, the Board reasoned because the employer had "no reasonable basis" to file the lawsuit, and inasmuch as the nature of the lawsuit was to penalize the employee for having utilized the Board's processes against the employer, the lawsuit violated the Act because the employee has suffered a "significant property loss" by having to defend against the lawsuit. Notably, the Board in that regard specifically likened the *Power System* case's 8(a)(1) and (4) allegation (involving a lawsuit-defense property loss incurred by the employee because of filing a charge) to a Union's fining of a member (because he had failed to exhaust internal union remedies prior to filing charges with the Board) in violation of Section 8(b)(1)(A), *Operating Engineers, Local 138 and Charles S. Skura*, 148 NLRB 679, 681 (1964). Thereat the Board made clear its central concern:

> Not only does the Board have the authority to protect employees who participate in the Board's processes, but it also has been held that the Board has an affirmative duty to exercise that authority to its outermost limits to protect such employees. (Cases cited in footnote 8 omitted.)

In *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983), the Supreme Court had occasion to address the Board's Power System rationale resting fundamentally on a retaliatory lawsuit as a violation of the Act, and to trace its development. While the Court observed with approval the Board's prior 8(a)(4) concern with an employer's retaliatory lawsuit, that important statutory consideration did not prevail in context of a countervailing fundamental First Amendment right of an individual (employer) to bring a meritorious State Court lawsuit.

General Counsel acknowledges that the Board's *Power Systems* case holding has been modified to some degree by the Supreme Court's holding in *Bill Johnson's Restaurants* case *supra*. However, General Counsel contends that the Court's holding therein does not preclude a Board finding of the unfair labor practice that is being urged herein.

Unlike the instant case situation where the State Court lawsuit has run its course, the *Bill Johnson's Restaurant* case addressed a Board determination that an employer's still (at least in part) viable state law was filed by the employer in retaliation against employees for having filed charges with the Board. The Board then concluded the filing of the lawsuit, in context one unfully determined by the state court, but determined (by the Board) to be both retaliatory and without merit, was an act violative of Section 8(a)(1) and (4) of the Act. The Board issued a cease and desist order seeking to halt employer's prosecution of the state court civil suit. In resolving the issue, the Supreme Court centrally observed, *id.*, 741, "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." The Court thereafter in summary held:

> [T]he Board may not halt the prosecution of a state court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact of law. Retaliatory motive and lack of reasonable basis *are both essential prerequisites to the issuance of a cease and desist order against a state suit.* The Board's reasonable-basis inquiry must be structured in a manner that will preserve the state plaintiff's right to have a state-court jury or judge resolve genuine materal factual or state-law legal disputes pertaining to the lawsuit. Therefore, if the Board is called upon to determine whether a suit is unlawful prior to the time that the state court renders final

> judgment, and if the state plaintiff can show that such genuine material factual or legal issues exist, the Board must await the results of the state-court adjudication with respect to the merits of the state suit. *If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief.* In short, then, although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis. (Emphasis supplied.) 461 U.S. at 749-750

Respondent LL 707 agrees that the governing authority in determining whether the filing and prosecution of an action in a state court constitutes a violation of the Act is the United States Supreme Court's decision in *Bill Johnson's Restaurants, Inc., supra.* Respondent however advances a different view of the import and application of that holding in the instant proceeding. Respondent contends there is still a requirement upon the Board to make a reasonable basis inquiry vis-a-vis the question of retaliation in an unsuccessful, but nonfrivolous lawsuit. In that respect, Respondent LL 707 contends its filing of the state court action did not violate the Act because LL 707 effectively shows it had both a reasonable basis for, and a lawful objective in bringing the lawsuit, namely Gilbert's continuing misconduct at meetings, and at the Union's hall, and the effects of such Gilbert misconduct on Local Union officers and other members; and consequently Respondent's effort (albeit unsuccessful) to have the Court stop Gilbert's disruptive misconduct, was but with lawful purpose or objective.

Respondent specifically contends that the Court did not state in *Bill Johnson's Restaurants* that the Board may find an unfair labor practice without making the inquiry

as to whether the suit in question had a reasonable basis; and Respondent urges the Board to do so, as part of its (overall) determination of whether the unsuccessfully brought lawsuit was (not only) retaliatory but brought without a reasonable basis existing in fact or law, and thus violative of the Act, here Section 8(b)(1)(A).

In support of that urging made to the Board, Respondent places heavy reliance on the weighty countervailing concerns as expressed by the Court, *id.*, 741, *inter alia*, of the right of access to the courts as, "an aspect of the First Amendment right to petition the Government for redress of grievances"; of prior Board and the Court's recognition, *ibid.* that, "[G]oing to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer"; and finally, that, "The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." Based thereon Respondent essentially urges the Board to continue to give a *weighted* consideration to those constitutional concerns on First Amendment access to the courts in manner that does not serve to effectively chill their exercise. Respondent appears to have argued for a balancing test that would favor the evidence of a reasonable basis (presumably whether of fact or law) for bringing the unsuccessful lawsuit, in urging in brief, ". . . the less it appears that a particular suit has a reasonable basis, the more likely it will be that the suit was brought for a retaliatory purpose." Respondent thus appears to contend that its successful establishment of existence of a reasonable basis (in fact and law) for bringing a lawsuit, even if the lawsuit itself is eventually unsuccessful, should operate as a complete defense to an initially evidenced retaliatory lawsuit.

Respondent thus argues that the Supreme Court in *Bill Johnson's Restaurants* has effectively overruled *Power*

Systems, and returned the law, now with constitutional underpinnings, to its state under *Clyde Taylor*. Respondent would have noted, that in *Clyde Taylor*, 127 NLRB at 109, the Board, anticipating the Court's admonition that any interpretation of the NLRA should be sensitive to First Amendment values, stated that it, ". . . should accommodate its enforcement of the Act to the right of all persons to litigate their claims in Court, rather than condemn the exercise of such right as an unfair labor practice."

Moreover, it is Respondent LL 707's position that decisions rendered in the wake of Bill Johnson, all arrive at the same conclusion, stated (at one point) to be that in order to constitute an unfair labor practice the lawsuit brought must *both* lack a reasonable basis and (somewhat ambiguously) have an unlawful object. Respondent however, has otherwise more clearly contended in brief that, construed in the light of the constitutional concerns involved, the *Bill Johnson's Restaurant* case states that the filing of a state court suit cannot be deemed an unfair labor practice, unless, so argues Respondent, in the words of Justice Brennan, concurring in *Bill Johnson's Restaurants*, the lawsuit was (1) filed with the intent, "to frustrate the operation of federal labor law," *and* (2) lacked basis in law or fact. 461 U.S. at 753.

It would appear however that in regard to Respondent's intended reliance on Justice Brennan's observation on a litigant's intendment to frustrate operation of federal labor laws as applicable to an adjudicated nonfrivolous lawsuit, the same is at best only arguable, for the Justice appears there to have been addressing the case's main aspect of the Board's (in effect) premature interdiction of the prosecution of an unpreempted nonfrivolous action filed in the State Court. Thus, Justice Brennan, following observation of the Court's earlier recognition of the right under the First Amendment of an individual to seek redress of grievances in state courts, and, of

other previously Court recognized unpreempted right to sue, e.g. for libel in state court, stated:

> Accordingly, it is appropriate to infer in a case implicating First Amendment rights, as here, that Congress did not intend to authorize the NLRB to enjoin the prosecution of an unpreempted state-court lawsuit, even if the plaintiff's subjective intent is to frustrate the operation of federal labor law, except where the plaintiff's First Amendment interests are at their weakest-where the suit is without a reasonable basis in fact or law.

Nevertheless, Justice Brennan did draw attention to an important distinction, and in footnote 3 related thereto has, seemingly, succinctly framed the issue and considerations to be addressed by the Board in the instant case. Thus Justice Brennan later observed:

> However, as the Court makes clear, ante, at 2169, 2173, the Board's ability to enjoin prosecution of a state suit is not the measure of its ability to determine that such prosecution constitutes an unfair labor practice or of its ability to provide other remedies to vindicate federal labor policy. Cf. New York Times Co. v. United States, 403 U.S. 713, 733, 91 S. Ct. 2140, 2151, 29 L. Ed. 2d 822 (1971) (WHITE, J., concurring) ("failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication"). As to the necessity and the scope of these remedies, the Board is entitled to a high degree of deference.[3]
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> * * *
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> 3. Reasonable people could differ over the wisdom of deciding that a nonfrivolous suit which is withdrawn, or in which the plaintiff ultimately does not prevail, constitutes an unfair labor practice, see ante, at 2173, but that is a question of labor policy for the Board to decide in the first instance.

It would appear that the issue for the Board is not whether the Board may find that a lawsuit finally adjudicated as without merit is retaliatory and violative of the Act. The opinion of the Supreme Court would appear already to indicate that it may, cf. fn. 15, 461 U.S. at 750, which in pertinent part provides:

> It appears that only the libel count remains pending before the state court. If petitioner's other claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritous claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose.

In my view the central issue being presented by the instant case is whether the Board has done so (precedentially) and if not, should do so, and if so, under what circumstances. In other words what is to be the standard in *Bill Johnson's* type cases for the Board's evaluation of whether a nonfrivolous lawsuit finally adjudicated as nonmeritorious (or a lawsuit withdrawn for justifiably sound reason, as in the case of unanticipated unavailability of key supporting witness, e.g., untimely death) is nonetheless retaliatory *and* thus to be held violative of the Act. Essentially the question is, is there to be any evaluation of the reasonable basis legitimacy of the underlying issue (of fact or law) brought to the state court, beyond the state court's determination the state court plaintiff does not prevail. If there is to be any such inquiry, the parties have joined in subordinate issue the question of on what base, e.g. on whether the scope of such inquiry would extend to evaluation of other evidence arguably supportive of the claim (e.g Gilbert's earlier defiant conduct in the removal of Moran's desk) but *not* presented before the State Court, or, to events occurring subsequent to the state court hearing, but evidencing in some manner a further (then unavailable) support for

plaintiff's prior contentions made at state court, (e.g., contended continued misconduct on the part of Gilbert). While General Counsel seemingly would limit Respondent to its State Court claims and evidence, charging party and seemingly Generaly Counsel would claim right to litigate sham, frivolous and/or contrived nature of facts as advanced in the lawsuit on contention the issue before the Board is a different one than that before the State Court. Essentially I agree in part, and disagree in other part.

The General Counsel would appear to relatedly recognize, if not concede, that some further inquiry is to be made on the retaliatory issue in the case of a failed, but nonfrivolous lawsuit, in acknowledging (essentially) that the Court's *Bill Johnson's Restaurants* holding appears to invoke no more than that the fact that a state court has determined that a lawsuit is nonmeritorious (fails on fact or application of law) is only *one* factor to be considered by the Board in its determination of whether the suit filing is retaliatory and violative of the Act. General Counsel has congruously acknowledged that the Court did not clarify what the other factors to be considered are.

General Counsel has relatedly urged that the factors considered by the Board in its earlier *Power Systems* case would appear appropriate to be considered by the Board as other factors in its determination of whether the filing and prosecution of a nonfrivolous but unsuccessful lawsuit is retaliatory, and violative of the Act; and General Counsel contends that approach is permitted under the Court's *Bill Johnson's Restaurant* holding.

As stated by General Counsel in brief, the factors considered by the Board in *Power Systems* were: (1) The unfair labor charge filed by the employee which ultimately led to the (respondent employer's) lawsuit, was a reasonable one, even though the charge was found to be unmeritorious by the Regional Director; (2) there

was an absence of evidence that the unfair labor practice charge lacked probable cause or was filed for purposes of harassing the respondent as alleged in the lawsuit; (3) the evidence relied on by the respondent in filing the lawsuit did not support its allegations that the unfair labor practice charge lacked probable cause or was filed for purposes of harassment; and (4) the true purpose of the lawsuit, to forever enjoin the employee from exercising his or her right to file charges under the Act, is revealed by the remedy sought by the respondent, and thus reveals the unlawful nature of the lawsuit. The fundamental question is what is to be the scope of deference to the state court hearing on the issues raised before it.

i. *discussion of General Counsel's advanced standard*

Not only is deference to be generally extended to the state court determination of the issue if found meritorious as directed in *Bill Johnson's*, 461 U.S. at 747, but, it is my view that a deference to the due process hearing should be extended, including in regard to a determination that the failed lawsuit was nonfrivolous. Thus, the respondent when appearing before the Board should be governed by its (plaintiff's) case as urged and supported before the state court, absent the usual justifications for having failed to do so, e.g. be limited both on theory of cause of action there raised, and facts there presented, with Board (at best) additionally accepted of only newly discovered, or previously unavailable evidence of matters *then* made material.

General Counsel's (and Charging Party's) urged position would appear (understandably) to place its primary or basic stress on facts evidencing a presence of a retaliatory motive in the Respondent's bringing of its State Court lawsuit. However, to the extent their position is to be viewed as one urging the addressment is to be solely as to the initial retaliatory aspects of the lawsuit,

once determined unsuccessfully brought, that position would then appear not to have allowed for any real defense consideration of the "reasonable basis" that the party may have had for initially bringing reasonable state lawsuit claims for a resolution by the State Court. The standard then in substance becomes the only defense for bringing a retaliatory lawsuit, is to prevail. It does not appear to allow, e.g., for an analysis of the potentiality of dual motive cases. Even considered otherwise, such a standard in application, on its face, would appear to extend an undesirable "chilling" reach in its application to cases where the state court's determination in the end rests (as it frequently will in cases other than, perhaps, a case arising in instant posture) on the court's determinations of credibility of witnesses' testimonies where in conflict, and its view of the weight of the thus credited testimony. It may rest on the State Court's application of state law, with varying gradations of complexity and clarity ascribed to the status of the state law on the point. In general, there appears discernible merit to Respondent's raised concern that the Board's standard should be broad enough to take into meaningful account Respondent's right to have its reasonable state claims of this order resolved by the state, even where the resolution may go against the plaintiff on determined fact, or applied law in that state action, discussed further *infra*. The *Power Systems* case itself, in my view, appears to reflect just such Board intendment of a balancing of elemental considerations in its decision.

Insofar as now material, in *Power Systems*, the base of the employer's civil suit rested in significant part on the fact that an employee had theretofore filed a charge against the employer with a Regional Office of the Board. That office (with interim review of General Counsel's Office of Appeals) subsequently determined the charge filed by the employee was without merit, and it declined to issue a complaint on the matter. *Power Systems* subsequently filed a civil suit to recover its expenses suf-

fered in defending the employee's unfair labor practice and a related OSHA nonmeritorious charge. (The employee had much later also filed a charge with OSHA which was determined to be without merit by that Agency. It would appear present analysis need not address the OSHA charge consideration further.) The employer's civil suit as initially filed had registered a claim that the above unfair labor practice charge had been filed by the employee *without probable cause, and with purpose to harass the employer.* As the Union does here, the employer there sought to defend General Counsel's complaint allegation that the filing of employer's lawsuit in a state court violated the Act, with an asserted reasonable belief it held in the merits of its own lawsuit. (However, unlike here, the state court there had not fully resolved the employer's state claim.)

In *Power Systems*, despite Board acknowledgment that there had been difficulties in the prior unfair labor practice charge resolution, namely in the investigator's differentiation between the employee's protected and unprotected conduct, the Board concluded the employee had shown probable cause basis for filing the charge (at least) sufficient to discount purpose to harass employer, although not sufficient under all the circumstances to occasion issuance of a complaint. In respect to the Board's conclusion the employee had not filed the charge with intent to harass employer, the Board observed that it had been presented almost no evidence to the contrary. With regard to employer's defense of its own belief in its lawsuit claims that the employee had lacked probable cause, and had filed the charge to harass the employer, upon Board review of the Respondent's evidence proffered to support its lawsuit, the Board held the same negated that the employer had "*reasonable basis upon which to assert*" that the employee's, ". . . single charge with the Board was filed without probable cause or to harass it. . . ." The *Power Systems* holding itself, in my view, arguably envisions Board evaluation of not only the prob-

able cause the employee had in filing a charge for investigation, but does so in relationship to evaluation of the *probable cause* respondent had for bringing its civil suit (as opposed to a required success in bringing such suit). The case would appear not wholly dispositive, since, as noted, it appears in *Power Systems*, as in *Bill Johnson's*, the state court had not ruled on that employer's lawsuit.

However, an application of the advanced *Power Systems* reasonable base standard, being essentially factor (3) above, if to be applied to a lawsuit claim that is based otherwise, e.g. where, as here, the lawsuit claim is based on (contended) good-faith belief of misconduct of the member-employee who has earlier filed the charge, tends to lend precedential warrant for a Board addressment and analysis of the reasonableness of the lawsuit claim as brought, even if, as here, unsuccessfully prosecuted.

Question arises whether Board addressment and evaluation of the genuine issues of fact and law, is to be *as advanced and resolved in the other forum*, or anew. The former would appear to sufficiently comport with other Board precedent in handling of claimed legitimate defenses before it, cf. *Wright Line*, 251 NLRB 1083 (1980), enf'd. on other grounds, 662 F. 2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982) (In that respect, genuine issues of fact and law properly resolved in other forum do not import any conflict with the Act's provisions.) Moreover, the Board has explicitly held that in dual motive cases (indeed in a case specifically involving conflicting contentions advanced on an 8(b)(1)(A)-union constitution violation) a *Wright Line* analysis is properly to be applied, cf. *Local 2017, UAW (Federal Mogul Workers Association)*, 283 NLRB No. 122 (30 April 1987). It would seem just as properly applicable where the defense raised is to be a claim of a state court lawsuit brought on reasonable (fact or law) basis, albeit unsuccessful.

The Respondent appears to me to be (essentially) contending for more than such a standard, *viz.*, that a respondent's successful demonstration that it had a reasonable basis in fact and law to file a lawsuit, even if its prosecution should prove unsuccessful, should be considered by the Board as a *complete* defense, because of the importance of the First Amendment exercise right involved. This seemingly regardless of what its true motivation may be otherwise shown to be. However, as reviewed above, the Court's holding in *Bill Johnson's Restaurants*, would appear not itself to have mandated that result. Neither the parties, nor my own research has revealed what position the Board has adopted on remand in *Bill Johnson's* on the (seemingly) open question.

Nonetheless, Respondent has advanced a number of cases decided in the wake of the *Bill Johnson's Restaurants* case, that it argues are supportive of its contention that the Board *must* find a lawsuit lacked a reasonable basis in fact or law, to find the filing of the lawsuit, even one unsuccessfully prosecuted, was retaliatory *and* violative of the Act. Respondent severally relies on: *U.S. v. Hylton*, 710 F. 2d 1106 (5th Cir. 1983); *ILWU, Local 32 v. Pacific Maritime Association*, 773 F. 2d 1012 (9th Cir. 1985); accord, *Martinez v. Deaf Smith County Grain Processors, Inc.*, 583 F. Supp. 1200, 1210 (N.D. Texas 1984); *Arch L. Heady Funeral Home*, 271 NLRB 819, 828 (1984); and *Mister Fox Tire Co.*, 271 NLRB 960, 961 (1984). Respondent argues therefrom that, "Any lesser standard of proof would impermissibly infringe upon the First Amendment's guarantee and protection of a state court litigant's right to nonfrivolously petition for redress of grievances."

ii. *discussion of Respondent's advanced standard*

The *Hylton* case is a criminal case, but otherwise one that arose in essentially the same First Amendment posture as did *Bill Johnson's Restaurants*. The case thus

arose in a background of pending criminal trespass informations brought against IRS agents in a local Texas County court pursuant to earlier nonfraudulent criminal trespass complaint filed against the IRS agents by Hylton. The Fifth Circuit centrally upheld a lower federal district court's dismissal of a subsequent federal indictment that charged Defendant Hylton with the crime of corruptly endeavoring to intimidate and impede the two IRS agents by the earlier filing of the criminal trespass complaints with local authorities. The Fifth Circuit's affirmance, despite evidenced desire of Hylton to impede the Agents, rested on the Court's conclusion that Hylton's conduct in filing the (established) nonfraudulent criminal complaints was protected from subsequent criminal sanction as an exercise of an inalienable constitutional right to petition governmental authorities for redress of grievances. The Court did state therein, with *Bill Johnson's* supportive citation as follows:

> Moreover, the Supreme Court has held expressly that the first amendment right to petition protects the individuals (sic) right to file an action with a 'reasonable basis' in a state tribunal. 710 F.2d at 1111.

However the fact is clear that the local (criminal trespass information) proceedings were there still pending. In that sense, the central holding of the *Hylton* case would appear not to advance Respondent's argument much beyond the basic holding of *Bill Johnson's Restaurants.*

Apart from observation the case is distinguishable in that it is a criminal case, what would appear notable otherwise in connection with the circumstance of the pending local criminal informations in the *Hylton* case is the circumstance that there was evidenced a local (prosecutor) determination that there was cause (accurate factual complaint by Hylton and appearance of applicable law) for issuance of the criminal informations, *and* Fifth Circuit Court observation in footnote 7 of its opinion that the fact the IRS agents may yet have a

valid defense (engagement in privileged or immunized conduct), a matter still to be determined in the criminal trespass proceedings, did not operate to vitiate Hylton's exercised constitutional right to petition. *Id.* pg. 1111.

The *Hylton* case would thus appear to stand for the principle, at least in cases raising issue of attempted subsequent federal *criminal* sanction bottomed solely on an individual's prior exercise of constitutional right to petition on accurate facts constituting apparent cause under applicable law for initial issuance of state criminal information, that neither the possibility of a future unsuccessful prosecution because of affirmative defenses of privilege or community, nor presence of initial desire of complainant to impede or the complainant's present enjoyment of federal agent impedence, is defeative of the protected exercise of the constitutional right to file the nonfraudulent complaint. The same Court observed however it might be otherwise if the local filing were frivolous and (sic) based on *contrived* allegations. Surely the same is with Supreme Court supporting view on litigation based on "intentional falsehoods" or "on knowingly frivolous claims," 461 U.S. at 743.

The *ILWU, Local 32 (Pacific Maritime Association)* case, *supra*, would also appear readily distinguishable. There the 9th Circuit did recite the *Bill Johnson's Restaurants* case holding in form that a retaliatory lawsuit violated 8(a)(1), ". . . if the suit (1) is filed with an improper motive and (2) lacks a reasonable basis in law." Again however the case arose in *Bill Johnson's Restaurants* case posture. There was a pending claim, one not finally adjudicated, in that the Union was actively pursuing a 301 lawsuit for enforcement of an arbitrator's award (by virtue of an appeal of lower court adverse ruling thereon). Moreover, in this instance the central legal conclusion upheld by the 9th Circuit was that the Union's 301 lawsuit itself lacked a reasonable basis in law because of the Board's earlier contrary Sec-

tion 10(k) determination of the underlying jurisdictional dispute. The lack of reasonable basis in law rested on clear precedential application of the Supremacy doctrine barring an arbitrator from making an award inconsistent with an NLRB determination. 773 F. 2d at pgs. 1017-1018. This consideration is shown made by the Court apart from otherwise independently evidenced and noted 8(b)(4) unlawful objective consideration (e.g. "a suit that has an objective that is illegal under federal law"), explicitly excluded (along with cases preempted by federal law) from *Bill Johnson's Restaurants* case coverage. 461 U.S. at 737, fn. 5.

Martinez v. Deaf Smith County Grain Processors is a Fair Labor Standards Act (FLSA) case. This FLSA action arose in federal district court on a Department of Labor (DOL) suit brought against an employer pursuant to an employee's earlier filing of a minimum wage complaint against the employer. After the employee there had registered his complaint with DOL, he left employer's employ. The employer filed a lawsuit against the employee for breach of contract in state court. Shortly prior to resolution of the FLSA action by the District Court, employer had pressed its state court claim, and the state court adjudicated that employer's (undefended) lawsuit brought for breach of contract in state court was meritorious. However, the district court's finding effectively relegated the state court holding to a case of lack of reasonable basis in law posture under *Bill Johnson's Restaurants.*

Thus the District court distinguished its own status under the *Bill Johnson's Restaurants* holding, as compared with that of the Board, on the basis that in contrast with NLRB finding of a violation that has no effect on an otherwise meritorious lawsuit, the district court's finding that an FLSA violation had occurred *deprived* the state court action of its reasonableness basis in law, a possibility which the District Court further concluded

should have been apparent to the plaintiff employer in pressing the state court claim earlier. Thus while the District Court (also) does recite *Bill Johnson's Restaurants* holding as requiring two findings, "(1) that the suit was filed with retaliatory motive, and (2) that the suit lacks a reasonable basis in fact or law," it did so clearly in regard to when a state suit is to be viewed a prohibited act in law; and thus the *Martinez* case holding does not appear (in my view) to advance Respondent's argument much beyond one of *Bill Johnson's Restaurants* central exclusions.

The *Martinez* case is however, otherwise notable for the Court's determination that the time of the filing of the state suit against the employer shortly after that employee's filing of an FLSA claim, and is prosecution shortly before the district court's hearing as well, is clear indication of a retaliatory motivation.

The *Heady Funeral Home* case is a Board case but its holding extends only that the Board has approved an administrative law judge's finding (to which there was no exception) that in light of *Bill Johnson's Restaurants* and a pending state action, that a certain 8(a)(1) and (4) complaint issue should be severed, and stayed. Respondent relies on the ALJ's "reasonable basis" language (presumably) as differentiated from reference to State Court determination of lack of merit in the suit, thus:

> . . . [T]he record that has been developed shows the existence of a possible factual question or state law dispute for the state court to resolve that would aid the NLRB in its determination of whether or not the Respondent's (sic) herein had a reasonable basis for their lawsuit against . . . [employee].

As I read *Bill Johnson's Restaurants* and the subsequent Board action in the *Heady Funeral Home* case, there was simply an absence of grounds for a present finding by Administrative Law Judge and/or Board that

the pending lawsuit was sham and frivolous, or that it raised no genuine issue of fact and law. In that instance, the allegation may be severed, and in any event should be stayed, as the pending lawsuit is not enjoinable by the Board by remedial order, or otherwise, before state court resolution on the merits when brought with apparent reasonable basis in fact and law. The *Heady Funeral Home* case is not persuasive.

The *Mister Fox Tire Co.* case was similarly a Board case, but one in which the Board centrally concluded there was no violation of Section 8(a)(3) and (1) in that the Respondent would have arrested an employee for a threat of inflicting physical harm to the respondent's general manager even in the absence of any protected activity. Respondent however, as pertinent here, relies on former Board Member Hunter's notation:

> [T]he first amendments to the Constitution guarantees the right to seek redress from the courts, and that no violation of the Act arises from the exercise of this constitutional right unless the exercise is both unlawfully motivated, and is without merit." 961, fn. 2.

In addition to the threat former Member Hunter noted the finding of the ALJ that the employee uttering the threat ". . . was 'a powerful figure of a man' and a threat of force by the employee could not be lightly regarded; and in these circumstances, ". . . would find that the Respondent's prosecution of . . [employee] . . . was not baseless and for this reason cannot be found to have violated the Act." *Ibid.* Once again however a harrassment conviction of the employee was there on appeal and pending, 271 NLRB at 963. The cases advanced by Respondent are simply not wholly persuasive of its urged view of the standard to be applied. If anything, the *Mister Fox Tire Co.* case would appear to import propriety of a *Wright Line* approach.

Respondent has finally argued in brief that its research has disclosed no cases in which the Board or a Court has (explicitly) stated that it was unnecessary for the Board to determine whether a state-court plaintiff's suit lacked a reasonable basis before finding that its prosecution constituted an unfair labor practice. Neither have I. This is not a case where employee evidence essentially admits the cause of action. See *Adam Metal Prod. Co.*, 283 NLRB No. 133 (10 February 1987).

Respondent brings to Board attention, the only case it has found containing dicta that could possibly be read to support such an approach, *Dash v. NLRB*, 793 F. 2d 1062 (9th Cir. 1981). In *Dash*, the 9th Circuit first noted the Board had properly stayed its proceedings, and awaited the resolution of a state action on appeal of an award of unemployment benefits on basis of an employer's *reasonable* contention it was prejudiced by certain examiner phone refusals (*viz.* to allow employer time to obtain counsel and to call witnesses), and a related subsequent reliance of the examiner in decision on the merits, on the failure of the employer to call witnesses. In further addressing the alternative results of that lawsuit, the court stated as to one alternative of the lawsuit,

> If, however, the employer does not prevail in the state court action, the Board must determine whether the employer filed the suit in retaliation for the employee's exercise of protected rights, and thereby committed an unfair labor practice. 793 F.2d at 1070.

Respondent argues that such a reading of retaliation determination without affording consideration of the reasonable basis for bringing a lawsuit would be improper since the 9th Circuit in the *ILWU, Local 32 (Pacific Maritime Association)*, case, *supra*, had earlier clearly stated that the lack of a reasonable basis (for bringing the lawsuit) is a prerequisite to finding a violation of the Act; and, alternatively argues, even if such a read-

ing of the *Dash* case were correct, it would contradict the entire body of case law in this area and therefore, be of negligible precedential value.

In light of the analysis of the *Pacific Maritime Association* case holding made *supra*, the argument is at best, not persuasive. However, addressing the *Dash* holding front on, the Court's opinion does not appear to me to be incongruous with expression of the underlying General Counsel's normal basic burden to show the suit filing was a retaliatory act, or for that matter, incongruous with an expression of an ultimate burden resting with General Counsel to show the suit was filed in retaliation for the employer's exercise of protected rights, and not for other lawful reason advanced in defense that is indicative that the employer would have acted in the state court in the manner it did, even if there had been no protected activity, cf. *Wright Line*, *supra*. However, to the extent Respondent here has urged, once *prima facie* showing is made by General Counsel the lawsuit was filed with retaliatory motive, that it need only show in defense of its filed lawsuit, that its lawsuit although unsuccessful was not frivolous, or had some "reasonable base" in law and fact, and that it need not additionally show that it would have acted in that manner regardless of member exercise of protected Section 7 rights, under shield of First Amendment considerations, Respondent's advanced authorities, in my view, simply do not establish the seeming precedential departure from a warranted *Wright Line* application, nor has it convincingly shown such result is one that has been mandated by *Bill Johnson's Restaurants*, holding *supra*.

Analysis, conclusions and findings

It is the responsibility of an administrative law judge to apply established Board precedent which the Supreme Court or the Board has not reversed, *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963); *Ford Co.*, 230 NLRB

716, 718, fn. 12 (1977); and not substitute his own view of what the law should be, *Fred Jones Mfg. Co.*, 239 NLRB 54, fn. 4 (1978). I resolve the matter under the principles as explicated above, *Bill Johnson's Restaurants, Inc., supra; Power Systems, Inc., supra; Wright Line, supra; Local 2017, UAW (Federal Mogul Workers Association), supra; Petramale v. Local No. 17 Laborers Int. Union, supra*; and *Operating Engineers, Local 138 and Charles S. Skura, supra.*

To begin with, notwithstanding Respondent's urging to the contrary, it is very easy passage for me to the conclusion that Local 707 and its officers continued to harbor strong animus at the time Local 707 and president Nixon filed their lawsuit in state court on 7 December 1984. The passage rests easily and persuasively on the Board's prior adopted findings of LL 707's continued violation of the Act as earlier determined by ALJs Harmatz and Lawrence; and indeed, is only the more convincingly demonstrated so as to depth of that animus in consideration of their definitive underlying findings of the conduct of LL 707 and its officers stretching over a period from December 1983 through November 1984, as well as from the weight of wholly compatible evidence presented herein. Thus the same is readily apparent from broad overview of the now determined hostile union reaction to the content of leaflets that were critical of LL 707 incumbent officers when first distributed in December 1983; and from the hostility evidenced against Gilbert for his part therein, as evidenced: by the determined immediately retaliatory filing of internal union charges in January 1984; by the reckless and disparate process of those and other unfounded charges through sham trial in May 1984; and by the now determined unlawful LL 707 lapse of Gilbert membership in August 1984 (with DL 91 and International approval), with designed coercive effect of denying Gilbert right of nomination to LL 707 office in September 1984, and with con-

tinuing unlawful effects of denied membership that reverberated and permeated events through November 1984.

Accordingly, I thus first easily conclude and find that General Counsel has established a *very* strong prima facie case that Respondent LL 707 filed the lawsuit on 7 December 1984 with retaliatory motive. There is no reasonable question to be raised under any *Power Systems* requirements on the propriety and scope of the underlying charges Gilbert filed in 1984. They are with merit. They thus offer Resondent no viable defense that would be based on lack of probable cause, or unlawful harassment purpose of Gilbert in filing the meritorious charges. But that is not what Respondent has claimed in defense.

Next to be addressed is Respondent's raised basic defense of claim that it filed its lawsuit because Gilbert had engaged in, and it was reasonably felt Gilbert was likely to continue to engage in, serious misconduct; and misconduct of nature: that was disrupting LL 707's meetings; that was preventing the Union from conducting its required business, and that was effectively preventing a new union president from the related performance of his duties; and finally, misconduct that it had reason to believe was causing members to elect not to even attend the meetings. In those circumstances, Respondent argues it filed the lawsuit lawfully because it only sought to quickly and effectively stop Gilbert from engaging in such misconduct.

Deference of course is to be given to the state court's adjudication of a meritorious *Bill Johnson's Restaurants* state claim, 461 U.S. at 747. If adjudication of the claim goes against the plaintiff in the state action, as it did here, we then reach the question whether the Board under *Bill Johnson's Restaurants* will extend further consideration to Respondent's showing made on "reasonable basis" for bringing the unsuccessful lawsuit; and the scope of that consideration in light of other Board precedent not in conflict with *Bill Johnson's Restaurants.*

Existing Board and Court precedent warrants conclusion the Board will consider Respondent's "reasonable basis" (contended Gilbert disruptive conduct) for filing its unsuccessful lawsuit as a raised defense under *Power Systems, supra; Wright Line, supra.* That concern, if real, not contrived, and properly presented has legitimacy, cf. *Petramale v. Local No. 17, Laborers International Union, supra,* and *Steelworkers, Local 5163 (Bizzaro), supra.*

The threshold question becomes whether the issue of Respondent's "reasonable basis" in fact and law to bring the lawsuit is to be resolved solely on the basis of the evidence and law applicable to the theory of action brought before the state court in a due process hearing. In my view it should be so limited.

It is clear from *Bill Johnson's Restaurants* that the Board is to defer to a determination of the state court that a *pending* lawsuit presents triable factual issues (thus issues that are determined by it not to be frivolous, sham or baseless), or the Board should cogently explain its failure to do so, 461 U.S. at 746. It would appear to me to coextensively follow that where a state court has indicated in the resolution of a lawsuit that the lawsuit has presented the court with genuine issues of fact and law, the Board should also properly defer to that indicated conclusion in the state adjudication as well, and not entertain a resolution of the issue otherwise on its own, because the lawsuit, on some other fact or law base consideration, has failed. It certainly need not address a more extensive view of evidence that may be otherwise sought by a party to be presented before it; and, only the more clearly decline to do so when no issue of contrived fact has been raised by a party and/or opinion thereon reserved by the State Court.

In that respect, an unsuccessful state plaintiff is surely not likely to be heard to complain before the state court if evidence that is known, available and supportive of plaintiff's claim is not timely presented to the state court for

its consideration prior to the state court's resolution of the issues; and, similarly, that party should not be heard to complain as a Respondent before the Board, if the Board should also decline to consider previously unproduced evidence that might have supported the plaintiff's claim more before the State Court. Although the unfair labor practice allegation elements of restraint and coercion before the Board are in that sense different than the claim presented before the State Court, it seems to me that the substantive content of the Respondent's (Plaintiff's) proffered defense before the Board is likely to be essentially the same as the claim it sought to make in the State Court; and, the base of the complaint allegation is as likely to have been timely raised and/or preserved before the State Court by a defendant. At least where that is the case, as here, the above result appears warranted.

To the extent that Respondent may be viewed to have urged at hearing and/or in brief that the affidavits that LL 707 presented to the State Court in support of its lawsuit are to be viewed as having been submitted with but limited purpose, namely, to sustain its request for a temporary restraining order, that was immediately denied, and that accordingly Respondent LL 707 should be entitled to a complete litigation of those claims in this Board proceeding, its seems to me that that contention may be appropriately rejected. Not only did the State Court Judge elicit certain admissions from the State Court defendant (Gilbert) based on assertions contained therein, it is clear that the State Court Judge gave a full addressment to the entire substantive content of the plaintiff's affidavits; and that he did so in the light most favorable to support the plaintiff's cause of action as brought *and* pressed. Surely the Board may appropriately elect to do the same in its evaluation of an issue before it of assessing the reasonable basis in fact and law of the state claim as brought and presented. In my view, it need not and should not do more, for that approach

both affords a proper measure of difference to the State Court determinations, and lends support to the Board's own interests of efficient and effective administration of the Act, with reasonable husbandry of its own resources.

That there were genuine issues of fact and law is precisely what the state court judge here has already determined. Thus, for the record, Judge Fracasse expressed his appreciation to both counsel for having presented the legal claims and legal authorities, and for having focused on the problems and the issues in contention between them in a professional manner. That statement, in my view, can have no meaning other than the presiding judge adjudicated that the losing plaintiff litigant through counsel had presented *genuine* issues of fact and law and properly focused on them, as did the prevailing defendant. It is fair inference a judge will not so speak of record, where a litigant visits upon the court a cause that in the Court's actual addressment is shown to be sham or frivolous, or to rest on baseless and intentionally false or contrived fact, nor one apparent to him as a cause plainly foreclosed as a matter of law. That the resolution of the State Court issue here went off on an acceptance of losing plaintiffs' proffered facts as true in a *discretionary* denial of the injunctive relief sought, because there was deemed, all things considered, alternate and adequate (internal and external) union remedy available otherwise, does not weaken let alone conflict with the judge's stated view of the professional manner in which the underlying issues of fact and law were developed, narrowed and presented to the state court enabling an efficient resolution by the Court.

Accordingly, I would defer to that indicated State Court finding. I would relatedly not permit a relitigation of the underlying issue on a newly advanced theory, namely, that the case should be allowed to be tried before the Board on basis of a claim of Gilbert's claimed nonmembership. Ironically, were a contrary view to prevail a

violation here would then all the more readily appear made out in light of the Board's (subsequent, and now Court enforced) determination of LL 707's unlawful lapse of Gilbert's membership. However, an adoption of a procedure effectively being urged by Respondent upon the Board now, namely a procedure that would allow a party litigant, unsuccessful in advancing a specific theory of its action as brought in the state court, to either advance a new theory before the Board with intention to establish thereby that a reasonable basis existed in fact and law for the bringing of the unsuccessful lawsuit, or to bolster the lawsuit with additional available proofs (e.g. of contended defiant act of Gilbert in assisting in the improper removal of LL 707's property on 22 February 1984) would, at best, have the Board embrace a procedure with undesirable risk of being prone to disingenous, if not cynical results. Cf. *Petramale v. Local No. 17, Laborers International Union, supra*, 736 F.2d at 17.

Neither would I recommend that the Board permit a party's reliance on different events in its presentment of a defense not clearly advanced *and* successfully reserved before the State Court, e.g. (as here) that the evidence relied upon by the plaintiff in that proceeding is contrived. To be sure the General Counsel was not a party before the State Court. But the fact is that a charge on the matter of the lawfulness of LL 707's lawsuit under the Act was not brought until after the resolution of the State Court matter. Had a charge been filed before that State Court resolution, the General Counsel has standing to investigate the matter to satisfaction that genuine issues of fact and law exist and/or that the lawsuit brought is with appearance of being a retaliatory one with sham or frivolous base and thus is with *Bill Johnson's* standing to timely bring such a lawsuit into account with the purposes of the Act. The purposes of the Act need no protection from State Court determined nonfrivolous and nonsham lawsuits, especially where, as here, the State Court resolution on its face is compatible with the pro-

visions of the Act. Rather the purposes of the Act need redress only from the retaliatory lawsuits that fail *and* are violative of the Act.

Accordingly it is concluded and found that LL 707 did present a "reasonable basis" in fact and law for the lawsuit it filed, though Respondent LL 707 was unsuccessful in the prosecution of its lawsuit. Consequently I need not address (law firm) counsel's additional supportive testimony at instant hearing as to the process of diligent research it went through to determine, and the prefiling advice it gave its client Respondent LL 707 that such a lawsuit could be lawfully filed *and* defended as being not sham or frivolous. Neither need I further consider Respondent's urged incidents of Gilbert's (contended) continued misconduct being subsequently interruptive of union affairs; or address the several related and perhaps more difficult issues involved in an addressment of questions whether, and if so when, subsequent conduct of a state court defendant may legitimately serve to establish the plaintiff's good faith in its perceived "reasonable basis" for the plaintiff to bring the state court lawsuit when it did. However, in my view of existing and applicable Board precedent this does not end the inquiry as Respondent would have it. It but raises what I view as the ultimately dispositive issue, *viz.* the required evaluation of dual motive.

The dispositive question becomes what was LL 707's real motive in bringing the lawsuit. In that regard Respondent simply makes a wholly inadequate showing, at least under *Wright Line* guidance, that it would have filed and pursued this lawsuit, *in the manner it did*, even if Gilbert had not engaged in his broadly protected conduct in criticism of incumbent local leadership, old and new.

General Counsel presents related argument on Respondent's raising Gilbert's nonmembership in the state court hearing. That contention would appear more ap-

propriately addressed in connection with General Counsel's alternative advanced theory of violation, namely the suit was filed for an unlawful object. However, there is merit, it seems to me under *Power Systems*, in General Counsel's other related arguments: (a) that the real motive of Respondent in retaliation is revealed in the overly-broad injunction it sought; and (b) there was real coercion and restraint of Gilbert, as is to be evidenced by the damages (at least) as initially sought, and from Gilbert's actual loss of property as evidenced by the expenses he incurred in defending the state court lawsuit. I so find as to both.

By virtue of Board-adopted finding of Judge Lawrence, a finding now enforced by the Second Circuit, Gilbert is to be viewed in fact and law a member of LL 707 throughout the period from May 1984 on, and specifically in the times material herein covering meetings in the period August-December 1984. Assuming, for present purpose, that union counsel at State Court hearing effectively insulated contrary position of Respondent Local Lodge 707 being pursued before the Board (*viz.*, that Gilbert was not a member in the material period) from becoming an actual issue in the state court proceeding, the injunction the Union sought was, and *remained* overly broad.

The central (lawful) complaint of LL 707 was its belief that Gilbert, whether union member or no, was improperly disrupting union meetings and union business, and Nixon's related performance of his duty as president, by Gilbert's failure to follow reasonable internal union rules uniformly applicable to all present for the fundamental governance of membership meetings and the reasonable conduct of internal union affairs. LL 707 charged Gilbert with specific misconduct, namely, and severally: of failing to speak orderly, upon recognition of the chair; of continuous interruption of others when they were properly recognized by the chair and given permission to

speak; of failure to abide by union regulations and lawful officer directions; and, (considered most favorably to Respondent) of use of profane, demeaning, intentionally disruptive language and conduct, of nature plainly and (at best) demonstrably unassociated with any accusatory exercise by Gilbert of a protected right to criticize incumbent union leadership, but rather urged as engaged in for clear purpose of harassment and/or vindictive impedence of the conduct of any union affairs by LL 707 officers.

Assuming, without so finding, that LL 707 presented some evidence arguably tending to support incidence of Gilbert misconduct, what LL and its officers were in any event clearly not entitled to do was to seek to insulate LL 707, its officers and its membership from any and all Gilbert protected criticism of the Local's conduct of union affairs that they might deem or find offensive, or to penalyze him for having engaged in that conduct in the past. That is what, in my view, LL 707 really sought to accomplish in seeking, and then pursuing the broad temporary and permanent injunction. The injunction sought did not reasonably limit itself to correct the specifically enumerated disruptive misconduct by Gilbert of arguably unprotected harassment and intimidation, but rather effectively sought to keep Gilbert completely out of the Union's hall; out of the local Union's meetings; out of the Local's conduct of union business; and thus effectively out of the Local Union officers' hair. For the above reasons I conclude and find that Respondent LL 707 has failed to establish in defense that it would have filed and pursued its 7 December lawsuit, in the manner it did, even if Gilbert had not engaged in protected Section 7 activity. *Wright Line, supra.*

In my view, the broad injunction initially sought by LL 707 in the end also supports conclusion that Respondent's lawsuit was from the start both *aimed* at penalyzing Gilbert for having persisted in filing charges with the Board alleging contended wrongful union conduct, and *designed*

to prevent him effectively from further exercise of Section 7 rights under the Act, and as provided for by other Federal Statute.

Accordingly, for all of the above reasons, it is concluded and found that Respondent LL 707 in filing its lawsuit on 7 December 1984, in the circumstances and the manner it did, filed a retaliatory lawsuit against Gilbert in violation of Section 8(b)(1)(A) of the Act. In reaching the above findings, I would have it be clear, that contrary to any suggestion contained in Respondent's brief I do not view the state court's holding as having *accepted* Gilbert counsel's (there) stated general claim that under federal law Gilbert had a (blanket) right to harass and intimidate members (or officers) of LL 707 at the membership meetings, even if his conduct constituted a crime under state law, nor to extent exceeding, or plainly beyond what is protected accusatory commentary, cf. *Petramale v. Local No. 17, Laborers International Union*, 736 F. 2d at 17). Neither do I find persuasive Respondent's seemingly related suggestion that the State Court was of a mistaken view that it *could not* grant any injunctive relief for such conduct because the Union, as a matter of law, was not entitled to it. Rather it seems clear to me, from a reading of the record of that proceeding, as was essentially stated by the Court, the Court reviewed all the advanced relevant facts, and then exercised its discretion, for the reasons it explicitly stated.

additional observations

The above approach under *Bill Johnson's Restaurants*; of essentially holding both the state court plaintiff and defendant to reasonable base of fact and law determination on the cause of action and defense respectively, as raised, resolved and/or preserved in state court, appears to be a matter of first import. In the event, the Board would deem it advisable to adopt a different approach to the underlying unfair labor practice issue(s), *viz.*, one

of allowing the parties a full and unrestricted litigation anew before the Board on the issue of whether the failed lawsuit was actually a retaliatory lawsuit in violation of the Act, or defendable as one brought in good faith, and involving genuine issues of fact and law related to Gilbert alleged misconduct, the following additional findings are made which are deemed sufficient to resolve the issue as then presented in this hearing. First, it has been repeatedly ruled at hearing that to extent new evidence is proffered (with or without objection of the other parties) of nature to have effect of producing a collateral attack on prior Board findings, the same is (are) to be rejected. Those rulings are reaffirmed. (It is my essential view the same approach should be applied to any new evidence that would produce a similar effect on the State Court holding.) Second, a review of General Counsel's witnesses' accounts and Respondent's witnesses' accounts of the events that transpired in LL 707's meetings, and/or at LL 707's hall, in the period August-November 1984 are, in some respects in substantial conflict; and in several respects their witnesses' testimonies are inconsistent. The inconsistencies and conflict need not be resolved, beyond observation and conclusion that what in any event appears clear to me therefrom is; (a) the Union's claim that Gilbert had engaged in misconduct was not based on contrived evidence; and (b) the contended acts of misconduct attributed by LL 707 to Gilbert during this period appear inextricably intertwined with LL 707's previously determined unlawful lapse of Gilbert's membership. Since they, in my view, cannot be separated in the instant litigation, or their effects isolated, it follows that LL 707's lawsuit action violated the Act, cf. *Petramale v. Local No. 17, Laborers International Union, supra*, 736 F. 2d at 17.

ii. *The unlawful objective cases*

With the Second Circuit's interim enforcement of prior Board finding that the lapse of Gilbert's membership was

unlawful and ineffective, Respondent LL 707 may, or may not further pursue review of its contention otherwise. Even assuming that it does seek further review, the same does not affect the governing Board (and Court) resolution on me herein. As to General Counsel additional urging for a finding of violation in LL 707's State Court lawsuit filing on basis of Gilbert's asserted nonmembership, however, I remain unpersuaded.

The General Counsel essentially observes: that the Board in cases resolved post *Clyde Taylor*, *supra*, and post *Power Systems*, *supra*, has consistently found that a union violated the Act by filing a lawsuit against an employee (or employer) "in order to pursue an unlawful objective"; that the Supreme Court has specifically distinguished such cases, and upheld such Board holdings in *Bill Johnson's Restaurants*, 461 U.S. at 737, fn. 5. General Counsel relies on a case there cited, *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 NLRB 380, 383 (1970), enf'd. in relevant part, 148 U.S. App. D.C. 119, 459 F. 2d 1143 (1972), aff'd. 412 U.S. 84 (1973) (union suit to enforce a fine imposed on member who had resigned during a strike, in violation of Section 8(b)(1)(A)); *accord*, *IAM Lodge 1769 (Dorsey Trailers, Inc.)*, 271 NLRB 911 (1984) (union rule restricting resignation during strike unlawful). General Counsel asserts further reliance on unlawful objective suit holdings of: *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773, 777 (1981), enf't. denied 716 F. 2d 1249 (9th Cir. 1983) (union suit for declaratory relief and $30,000 in damages determined nonmeritorious, and with unlawful objective of penalyzing employee for filing meritorious charge against union that union had granted member extension of time to pay periodic dues under lawful union security clause, but then breached duty to fairly represent the employee by failing to notify the employer that its prior request that the employer discharge the employee was amended by the extension); and *George A. Angle*, 242 NLRB 744 (1979),

enf'd. 683 F. 2d 1296 (10th Cir. 1982) (employer suit against employee for malicious prosecution held, in light of various court findings supporting Board action, aimed at penalyzing employee for having utilized Board processes against employer, thus violative of Section 8(a)(1) and (4) of the Act). General Counsel similarly relies on *United Stanford Employees, Local 680 (The Leland Stanford Junior University)*, 232 NLRB 236, 330-331 (1977), enf'd. 601 F. 2d 980 (9th Cir. 1979) (union lawsuit to compel employees to become union members in violation of 8(b)(1)(A); *Television Wisconsin, Inc.*, 224 NLRB 722, fn. 2, 779-780 (1976) (lawsuit to apply or enforce an unlawful union security clause violative of 8(b)(1)(A)); *IOMMP (Cove Tankers)*, 224 NLRB 1626, fn. 2 (1976) (union lawsuit to influence employer in selection of bargaining representative and in furtherance of unlawful secondary picketing, in violation of Sections 8(b)(1)(B) and 8(b)(4)); and *Wisconsin River Valley District Counsel of Carpenters (Skippy Enterprises)*, 218 NLRB 1063 (1975), enf'd. 532 F. 2d 47 (7th Cir. 1976) (union lawsuit to enforce fine of supervisor-member for noncompliance with internal union rule).

The central argument of General Counsel however as to this case rests on an assertion of a specific illegal motive pursued in the lawsuit, namely that the basis of Respondent LL 707's lawsuit was to enforce its position that Gilbert was no longer a member of the Respondent Local. General Counsel observes (correctly) that a complaint alleging the Union's lapse of Gilbert's membership had already issued, and had already been heard by Judge Lawrence. General Counsel argues therefrom that Respondent LL 707's filing on the lawsuit thereafter was in reality an effort by the Union to enforce through the State Court the (now determined) unlawful lapse of Gilbert's membership, and consequently the lawsuit filing must therefore be found unlawful. The problem with General Counsel's argument is that it confronts a clear and unequiv-

ocal LL 707 disavowal of Gilbert's claimed nonmembership as an urged necessary element to its State Court lawsuit.

discussion

In general, I have no quarrel with General Counsel's advanced authorities insofar as they establish the principle that a lawsuit filed for an illegal objective, is itself illegal. Neither would it appear has Respondent.

In that regard Respondent itself has also noted the holdings of certain of the cases cited by General Counsel, e.g. *ILWU, Local 32 v. Pacific Maritime Association, supra.* Respondent moreover has added a few of its own. Respondent cites: *Chicago Truckdrivers (Signal Delivery Service)*, 279 NLRB No. 122, 122 LRRM 1100 (1986) (union demand for arbitration of grievances resting on urged dovetail of seniority lists of 3 separate units, and essentially seeking an enlargement of 3 historically separate units into one unit in face of (two) employer refusals to participate in union's arbitration demands, held, union insistence on arbitration is contrary to union's statutory collective-bargaining obligations; and union demands for arbitration have an objective illegal under Federal law, and are violative of Sections 8(b)(3) and 8(b)(1)(A) of the Act); *Truck Drivers, Local 705 (Emery Air Freight)*, 278 NLRB No. 210, 122 LRRM 1050 (1986) (assuming, without deciding, applicability *Bill Johnson's Restaurants* to a grievance, a grievance with secondary objective is for an unlawful objective, and thus *Bill Johnson's Restaurants* is inapplicable, and the grievance filing violative of Section 8(b)(4)(ii)(B)); *CWA, Local 6012 (Southwestern Bell)*, 275 NLRB No. 210, 120 LRRM 1060 (1985) (union state court action, filed to collect fines unlawfully levied against members who attempted to resign and go to work in a strike, is for illegal objective, and violative of Section 8(b)(1)(A)); and *Columbus Area Postal Workers (U.S. Postal Service)*, 277 NLRB No. 59, 120 LRRM 1333 (1985) (union properly to be ordered to move to dismiss union

lawsuit to recover expenses incurred in processing a grievance for nonunion bargaining unit member, as suit is for an illegal objective). Respondent however would have all such lawsuits brought with an unlawful objective distinguished, *Bill Johnson's Restaurants*, 461 U.S. at 737, fn. 5, since its lawsuit, as presented to the State Court, addressed claimed disruptive conduct of Gilbert, which Respondent urges is not an unlawful objective under the Act.

In contrast with General Counsel's urging that Respondent's lawsuit filing was an effort to enforce the Local Union's lawful lapse of Gilbert's membership through the State Court, Respondent focuses on the evidence it presented of Gilbert misconduct, and the relief it sought; and LL 707 argues that General Counsel does not contend it would have been contrary to federal law for the Court to have granted that relief. While the issue is arguably not one wholly free from doubt on the basis of "inextricably intertwined" reasonable basis for valid charges—unprotected disruptive conduct—and "invalid ones" accusations against union officers, in part with reference to nonmembership assertions, the fact is the contrary more clearly appears on State Court litigation basis. In the end, the issue as presented by union counsel at the State Court hearing, and as accepted and then determined by the State Court, simply does not support General Counsel. Although there are references to Gilbert's nonmembership in the supporting affidavits presented to the State Court, in the light of Union counsel's explicit and complete disclaimer of that (contended) fact as an issue, and the State Court's *acceptance* of the issue as so framed, I simply do not find General Counsel's argument is persuasive in its basic assertion that LL 707, in presenting its case in the State Court for resolution, had effectively proceeded on the basis of Gilbert's nonmembership in the Union. It is recommended that this theory of the complaint be rejected.

B. *DL 91's alleged failure to recall Gilbert.*

1. The issue as joined.

The second major issue is whether on and after 11 March 1985 DL 91 failed and refused to recall Gilbert to a dlr position, in violation of Sections 8(a)(1), (3) and (4). Respondent DL 91 defends that Gilbert had already resigned his dlr position in June 1983. General Counsel and Charging Party Gilbert counter that the evidence presented warrants a finding that Gilbert had proffered only a conditional resignation, which was never effectuated, because the underlying condition never has occurred.

2. Tracy-Gilbert longstanding internal union dispute

Gilbert and Directing LR Tracy are the principal protagonists in certain events that resulted in Gilbert's submission of a resignation in early June 1983. Gilbert has acknowledged that at this particular time his relationship with Tracy was not a friendly one. Internal union charge and countercharge had existed unresolved between them for over a year, indeed from as early as April 1982.

A few months earlier in 1982, Tracy had assigned (then) dlr Lou Fyles to assist LL 707; and more recently, Tracy had directed Fyles to distribute a certain leaflet (of undisclosed nature) in LL 707. Gilbert viewed Fyles' service to LL 707 as being (at best) inadequate. Gilbert, at this time LL 707's president, had repeatedly, but unavailingly, registered that complaint with Tracy. Gilbert subsequently came to view Fyles private meetings with groups of LL 707's membership as also being political, and independently improper. On one occasion president Gilbert locked Fyles out of LL 707's office for one day; and president Gilbert denied Fyles access to LL 707's phones. Fyles was also apparently unable to make a scheduled distribution of a DL 91 leaflet to LL 707's members. Tracy filed related charges against Gilbert;

and Gilbert filed countercharges against Tracy. These charges stood unresolved clearly through April 1983, which was about the time the International directive came down in regard to funding reductions in DL 91 that portended a layoff of three dlrs.

3. Gilbert's effective DL 91 seniority date of 1 August 1982

a. *The April and June 1982 elections*

In general, elections for dlrs are held every four years. In each LL, nominations and endorsements of candidates for open dlr positions are done in the month of February of an election year. Materially such was done in February 1982 (and materially again in February, 1986). A dlr candidate, in addition to meeting certain mandatory qualification requirements contained in the International's Constitution *and* DL Bylaws, discussed further *infra*, must also receive the endorsement of at least one LL.

Gilbert in prior years had held just about every LL union position, including many delegate positions. He had held positions in Statewide union organzations; and he was the incumbent elected president of LL 707. Gilbert has testified, without contradiction, that for the 1982 dlr election he had received the endorsement in almost all, if not all LLs (then) in DL 91.

An (initial) election of dlrs was held in April 1982; and normal taking of office by an elected dlr would be on 1 May 1982. There were 9 open dlr positions to be filled in the 1982 election. Each Local could nominate (as many but no more than) 9 individuals to fill the 9 open positions. In the election, Gilbert received enough votes to win election in one of those open positions. However, certain objections were filed to that April 1982 election. Upon International's investigation, and determination that greater safeguards in the election of dlrs were in order, the election was ruled invalid. The dlr election was rescheduled,

and it was rerun on 14 July 1982 (thus, as it turns out, approximately 2 weeks after Gilbert was discharged by P&W).

Related internal union charges of purported election misconduct (ballot stuffing) in the first election were brought *inter alia* against Cliff Forrester. (Charges were also brought against Paul Schmelke, Eddie Robinson and Alta Moran.) Forrester at this time was President of LL 700 (Middletown), delegate to DL 91, and also (apparently improperly) a self-appointed teller in the April 1982 election. Gilbert subsequently defended Forrester (and others) on all charges, and Forrester was apparently only directed not to again appoint himself a teller. General Counsel called Forrester as a witness to support certain complaint allegations of Respondent's subsequent misconduct directed against Gilbert. Respondent attacks Forrester's credibility on basis of having a bias favoring Gilbert, and one antagonistic to Respondents. I credit certain testimony of Forrester, and not other.

The rerun election was conducted on 14 July 1982. Gilbert won a dlr spot again. As noted on 23 July 1982, Directing LR Tracy (apparently pursuant to contract terms) requested a leave of absence from P&W for Gilbert to serve as dlr for a period from 1 August 1982, to (I find) normal elected dlr term ending of 30 April 1986. P&W initially declined the request, contending Gilbert was a discharged employee.

b. *Gilbert's DL 91 seniority established as greater than Tinella's seniority*

Respondent DL 91 has contended that dlrs, and particularly newly-elected dlrs (Robert Fleeting, Wayne Gilbert and Peter J. Tinella) were all elected for a common term that was to be effective 1 August 1982. It has contended (at least at one point) the newly-elected dlrs all had the same DL-91 employment starting (seniority) dates, based

on their election to a common term. However, in evidence and wholly persuasive of the contrary is Directing LR Tracy's letter of 29 July 1982 addressed to International which clearly notified International that Fleeting, Gilbert and Tinella were newly-elected dlrs; that Fleeting and Gilbert would take office on 1 August 1982; but that Tinella *would not take office* until 23 August 1982. As noted earlier the reporting delay of Tinella was arranged with P&W (and as obviously with DL 91) to enable Tinella to continue as (paid) employee of P&W to point of his vesting (upon completion of 10 years' service) a pension with P&W. Tinella did not actually work for P&W in the period, but Tinella has confirmed he was on the active payroll of P&W in that period. Neither did Tinella work for DL 91 in the period. It would appear then of no moment that many P&W employees may have taken two weeks vacation in August, or that Tinella received his vacation pay in a prior month. The fact is Tinella did not report for work at DL 91 until after Fleeting and Gilbert had reported.

It is clear to me from the above, and from corroborative weight of still other supportive evidence of record (inclusive of a further corroboration arising from a Tracy letter of 26 February 1985 to glr Almeida, specifically confirming Gilbert and Tinella above respective DL 91 staff seniority dates, discussed *infra*), that Tracy on 29 July 1982 had first notified International of the applicability of different reporting dates of the newly-elected dlrs (e.g. for start of International's contributory payment purposes). I find that Fleeting and Gilbert actually started their employment as paid employees of DL 91 in August 1982 before Tinella, who did not start his employment as a paid employee of DL 91 until 23 August 1982. (As noted earlier payroll records also confirm the same.) I thus preliminarily conclude and find that both Fleeting and Gilbert actually had earlier DL 91 staff employment date, and thus greater DL 91 seniority than Tinella,

and that Tracy was fully aware of that fact in that he (essentially) personally had confirmed Gilbert's greater staff seniority over Tinella to International on 29 July 1982, and to Almeida on 26 February 1985. (Tinella however did have more seniority with P & W than did Gilbert.)

c. *Other members of the "committee of the rank-and-file" elected as dlrs.*

Tracy's 29 July 1982 letter notably also advised International that six incumbent dlrs were elected for a similar 4-year term, as follows:

Cooper, David Jr.	Parent, James M.	Rondeau, Maurice J.
Drosehn, Fred	Romegialli, Andrew D.	Webber, Betty

The six incumbent dlrs who successfully ran for reelection of course had greater DL 91 seniority than any of the above three newly-elected dlrs.

The record in that regard significantly reveals that not only was Forrester an active member in 1982 of the "committee of the rank and file" (along with Gilbert and the Morans, as found and/or reflected in ALJs' Harmatz and Lawrence decisions), but so were, according to Forrester's uncontested testimony, both newly-elected dlrs Fleeting and Tinella, *and*, as well, reelected incumbents Parent, Romegialli, Rondeau and Webber. In this record Forrester has described the above committee (as functioning in 1982) as a group with common interests in seeing that certain individuals were elected as dlrs. Forrester has also identified Parent as being an influential leader of that group, along with Gilbert. I credit Forrester's uncontradicted testimony in the above respects.

4. DL 91's layoff of Gilbert in 1983

a. *Background; part played by International, DL 91 Delegate Body and Executive Board, and Directing LR Tracy*

George Poulin has been a General Vice President (GVP) of International since he was initially elected on 1 July 1977. At time of hearing Poulin was then serving in his third 4-year term as a GVP. Poulin's initial assignment was to serve as a Resident GVP with International President (IP) William Winpisinger at International's Headquarters in Washington, D. C., Poulin has testified credibly that in early 1983, International's Executive Council made an initial decision that there would have to be a severe staff cut to reduce expenditures because of reduction of membership in the Union, and a related reduction in revenues. It was determined that the required staff reduction would extend to layoffs in headquarter's professional staff, to auditors, office clerical employees (under contract), and to glrs and dlrs in the field. There was no hard and fast rule whether more glrs and dlrs were to be laid off.

The Grand Lodge (International) structures itself administratively by Regions, with a GVP assigned to each region. The regional GVP made the decision on the number of glrs or dlrs to be laid off (but only in sense of International cessation of contributory funding) based on where the GVP thought the Union was topheavy. (The International normally contributes 50% to the salary, and also a percentage to the fringe benefits of a dlr. The employing DL pays the remainder.) Subordinate DLs were then notified of the International's intended reduction in supported positions.

At the material time of the announced 1983 union layoff the GVP for the Northeast Region of the Union was apparently Sal Iaccio. GVP Iaccio notified DL 91 that effective 1 July 1983, the International would no longer be

able to make contributions to three of the dlrs positions in DL 91. Poulin was subsequently assigned as GVP for the Northeast Region of the Union in October 1983 (when former GVP Iaccio retired), thus well after the layoffs in DL 91 had been accomplished.

Poulin testified that he is familiar with DL 91's Bylaws; that they do not have a seniority provision (for layoff, or recall); and Poulin assumed that the DL and Directing LR had made the determination. In the end, I find, *infra*, DL 91's Directing LR Tracy made the initial recommendation, with (at some point) certain input from staff (essentially the dlrs), to DL 91's Executive Board, and Delegate Body, which, by their approval, effectively made the ultimate determination.

Thus, Poulin testified credibly that how the layoffs of dlrs was to be accomplished was up to the DLs. In such matters, the DLs are governed by the terms of their own Bylaws. Poulin relates, again with convincing documentary support of record, that the Bylaws of DLs vary substantially. According to Poulin, where a DL's Bylaws provided that the layoff is to be by seniority, that is the way the IP approved the reduction. (In DL 170, e.g., Article VIII, Sec. 16, provides for layoff (and recall) by DL service seniority, with use of a tiebreaker based on number of individual votes received in last dlr election.) In some DLs, only the Directing LR is elected; and the elected Directing LR hires all the dlrs. If the Bylaws are silent on the method of layoff, it was then up to the Directing LR and DL (Delegate) Body. In DL 91 dlrs are also elected, not hired by the Directing dlr; and under DL 91's Bylaws, in case of vacancy, an individual can be appointed only to a short unexpired term, of length not herein material.

DL 91's Delegate Body is composed of delegates elected annually by affiliated LLs, with numbers of delegates (including alternates) from LLs scaled to size of affiliated

LL membership. The Delegate Body annually elects eight (8) officers from its own Body. DL 91 has an Executive Board. DL 91's Executive Board is composed of four (4) of the eight (8) officers (namely, its President, Vice President, Recording Secretary and Treasurer) and (apparently) two (2) delegates from each LL. The Executive Board is empowered in DL 91 Bylaws with the supervision of *all* matters pertaining to the DL between meetings of the DL (Delegate Body); but the Executive Board makes a report of its actions *for DL approval* at the next regular meeting of the DL. In DL 91, the Executive Board (regularly) meets at least one hour before the DL Delegate Body meeting.

Dirs do not attend DL 91's Executive Board meeting. The Directing LR does. Though DL 91 dirs, as well as Directing LR regularly attend DL monthly Delegate Body meetings, they are not eligible to be delegates. (The Bylaws specifically provide both Directing LR and dirs can give counsel and advice, but they cannot vote.)

DL 91 Bylaws provide (generally) that the Directing LR administers the business affairs of DL 91, and Respondent Union contends Tracy had the authority to lay off and recall in whatever manner he wished. However DL 91 Bylaws also state that the Directing LR's action is subject to DL approval, and does so specifically in regard to staffing. Thus the Duties of the Directing LR of DL 91 as set forth in the Bylaws pertinently provide in Article XI:

> *Section 1*
>
> A. The Directing Labor Representative shall, within thirty (30) days, after assuming his position, establish a staff of personnel to transact the business of the District; he shall, in the best interests of the District, have full power and authority to administer the affairs of the District Lodge office to the best of

his ability *as outlined in Sections 3 and 4 of this Article.*

* * *

Section 3—Size of Staff

The Directing Labor Representative, *with the approval of the Executive Board and the District Lodge,* shall determine the size of the staff and personnel required to service the District. . . .

* * *

Section 4—Selection of Staff

The Directing Labor Representative shall be empowered with the *authority to select the personnel of the District Office subject to the approval of the Executive Board and the Delegate Body* and shall have the authority to discharge members of his personnel or to reduce the size of the personnel at any time he deems advisable in the best interests of the District Lodge and affiliated Local Lodges, and the members thereof, *with approval of a majority of the Executive Board and the Delegate Body.* (Italics supplied.)

There is argument made, and evidence of record that indicates "staff" is to be differentiated from "personnel" in that "staff encompasses the dlrs, and "personnel" others, e.g. office clerical employees. As is apparent from the above Sections 3 and 4, such a consideration has no significant effect on the authority of the Directing LR appearance of being subject to approval of Executive Board, and Delegate Body.

Poulin testified that if a DL decided to pay the full salary of a dlr, the DL did not have to lay off a dlr; and some DLs did just that. International just ceased its own funding of the dlr position(s) on the appointed day. Delegate Forrester confirmed that DL 91 had an option to keep the dlrs if they wanted to pick up their full salary, but DL 91 couldn't responsibly afford to keep

them. Poulin, who is familiar with the Bylaws of DL 91, as noted testified, and has done so essentially with corroboration of (former) Directing LR Tracy and (current) Directing LR Webber, that DL 91 Bylaws do not have, or define a layoff seniority position; and a review of DL Bylaws confirms that a provision that a layoff (or recall) be accomplished by seniority is not explicitly stated (as it is in the noted DL 170 instance). Moreover, the record reveals there was no DL 91 layoff (or recall) precedent to effectively draw on, as there hadn't been a layoff (or recall) in DL 91 for more than 20 years.

There is otherwise some conflict in testimony as to the authority of the Directing LR of Dl 91 in regard to layoff and recall of dlrs. Poulin assumed (generally) that the Directing LR and Dl 91 had made the decision on who was to be laid off, and on what basis. Webber testified that (former) Directing LR Tracy determined his role in the layoff and recall of dlrs; but (essentially) was non-committal on whether she had to follow Tracy's approach as precedent. How Tracy went about handling the initial layoff, in terms of input received from staff, is somewhat confusing. The ultimate result is not. The three dlrs clearly were laid off on the basis of their lower DL 91 staff seniority.

Romegialli previously served as an elected president of LL 709 (Middletown); and in 1981 Romegialli served as president of DL 91. Since 1 January 1982, DL 91 has employed Romegialli as a dlr, following Romegialli's initial election as a dlr on 9 December 1981. Romegialli was one of the reelected incumbents in the 14 July 1982 (rerun) election. In times presently material, Romegialli serviced, *inter alia*, LL 707 (North Haven). Currently Romegialli services LL 1746 (East Hartford), at which location all DL meetings are held.

Romegialli first heard about the DL 91 layoffs while Romegialli was attending an organizing school out of state. Gilbert called Romegialli to inform him that 3

dlrs were going to be laid off. When Romegialli returned, Tracy confirmed it. According to Romegialli, Tracey suggested that the staff meet privately and discuss the matter further. Staff consisted of the 9 dlrs and Lou Kiefer, an editor-organizer then employed by DL 91.) In late April or early May, as Romegialli has recalled it, but more likely closer to mid-April, the staff met, without Tracy, and discussed amongst themselves possible alternatives to and/or arguments that could be made against a layoff in DL 91. The staff presented certain of such alternative arguments to Tracy for his consideration. Tracy in turn presented certain related positions to International. International rejected Tracy's submissions.

The staff held a second meeting about 3 weeks after the first meeting. They discussed still other alternatives, this time chiefly probing possible local arrangements that might be made to avoid a layoff, or its effect. They also discussed various methods by which a required layoff might be accomplished, including a suggestion the layoff be in accordance with fewest votes received in the last election, and a suggestion by Drosehn that it be on a basis of overall seniority in DL 91 membership. Drosehn's suggestion was rejected because LL 707, although affiliated with DL 91 for about 10 years, had a history (apparently) as a combination of a UAW union and an independent machinist union before then. All of the above (local) approaches were rejected by the majority of the staff, and not presented to Tracy. However Romegialli has asserted that the staff did discuss, and reach a consensus thereon, that the layoff of the three dlrs should be effected on the basis of DL 91 seniority, which was to be computed on the basis of date office effective.

Romegialli and Drosehn (amongst others) reported the staff's above concensus to Tracy. Romegialli had no recollection of a (staff) discussion about a dlr recall at this time. However, Directing LR Tracy made initial recommendation not only as to the layoff of Fleeting, Gilbert and Tenella on that basis, but also, albeit in a limited

respect, for a May 1984 recall of Fleeting. Tracy made other recommendation for a maintenance of editor-organizer Kiefer (and organizer Jack Ferreira), though Kiefer (and Ferreira) was (were) laid off (Ferreira apparently by International) on 30 June 1983, along with the three (3) least senior dlrs Fleeting, Gilbert and Tinella.

Romegialli has relatedly testified that he knew of no Constitutional or Bylaws provision that would prevent DL 91's Directing LR from making the determination. In this case there are two decisional questions involved. One relates to staffing (layoff and recall), and the other to Constitutional and DL 91 qualifications for an individual to run for office. The two questions apply to wholly different issues.

In general Romegialli (and others similarly testifying) corroborate Poulin that only the IP can interpret International's constitution, with Romegialli adding as well, that only the IP can interpret DL 91 Bylaws. Romegialli clarified that the DL 91 Directing LR could give an opinion on DL 91 Bylaws, but added, if challenged the Directing LR would then seek IP clarification. There is much convincing documentary evidence of IP (sole) interpretation of the Constitution and DL 91 Bylaws in regard to the matter of qualification requirements of individuals to run for elective dlr positions in the DL.

The staffing (layoff-recall) considerations are however, alone material to the issues under present addressment in this section B. In that regard, and in substantial comport with Poulin general testimony, the DL 91 Bylaws, on which Romegialli relies, rather clearly prescribe on their face that there be a DL 91 Executive Board and Delegate Body approval of a Directing LR's staffing action; and Romegialli has in the end affirmed that Tracy made his recommendations in accordance with DL 91 Bylaws.

On 9 May 1983 Directing LR Tracy initially reported to, and obtained DL 91's Executive Board and Delegate

Body initial approval that there would be a prospective layoff of 3 dlrs on the above basis, namely that Fleeting, Gilbert and Tinella would be laid off "on the basis of seniority." In the Delegate Body meeting, delegate Forrester (who at the time was also a member of DL 91's Executive Board) sought unsuccessfully to have the selection of dlrs for layoff be based on the dlrs who had received the fewest votes in the last election. This was an approach considered by the staff itself, and rejected by its majority; and it was in any event rejected by the Delegate Body. In making the above findings I have relied on credible testimonial evidence of record independently supporting same. I have placed no reliance on Respondent's Exhibits 7 and 8 (minutes of the Executive Board and Delegate Body meetings of that date, respectively) which otherwise were neither offered, nor received in evidence. At this point the interrelation of events becomes more factually complicated. Understanding the chronology of events is critical.

5. The confluence and interplay in mid-1983 of: a DL 91 layoff of 3 dlrs, a P&W layoff of employees, and the (initial) arbitration hearing on P&W's 1982 discharge of Gilbert. Related considerations of Gilbert's unsuccessful initial attempt to obtain an early DL 91 layoff; background of Gilbert's alternative submission of a (contested) conditional resignation as DL 91 dlr; and LL 707's concurrent designation of Gilbert as its third shift safety representaitve reflecting a Gilbert resignation as dlr, but with union acceptance thereof conditioned on P&W's acceptance of LL 707's safety representative designation.

a. *DL 91's and Gilbert's first notice of impending DL 91 layoff of dlrs.*

It was (at least) in April 1983 that International had notified DL 91 that International would cease funding the 3 dlr positions effective 1 July 1983. Documentary

evidence, *viz.* a Gilbert letter to Tracy dated 28 April 1983 confirms, *inter alia*, that Gilbert even at that time was personally aware that he stood to be laid off effective 1 July 1983. Notably, Gilbert was not at that time aware however, that a P&W layoff of employees was to take place earlier on 3 June 1983, because the P&W layoff was not to be announced by P&W until the latter part of May 1983. (Neither was the related matter of a LL 707 third shift safety position appointment a matter of moment until that time.) Moreover, as of 28 April, unlike the other dlrs to be laid off, Gilbert could personally anticipate a return to P&W employment *only* if he was successful in the presentation of his discharge grievance in the upcoming arbitration that would commence in May 1983.

b. *Gilbert's effort to reconcile with Tracy*

The April 1982 Tracy-Gilbert internal union charge-countercharge was a mater of ongoing confrontation between Tracy and Gilbert. Their 1982 dispute had remained unresolved through April 1983. No doubt partial explanation of the delay in the internal union dispute's resolution was occasioned by the circumstance that Tracy had undergone open heart surgery in 1982. Tracy did not return to work until March 1983. Even then he did so only on a partial basis. Tracy would subsequently undergo a very slow recuperative period. Tracy has testified relatedly that even after his return in March 1983 he was without much vitality; and that he had remained under a doctor's care, with heavy medication being regularly taken for pain and stress for a year. Indeed, Tracy would retire on 30 April 1985 because of his ill health.

On 28 April 1983, Gilbert wrote a letter to Tracy suggesting, with self-stated interest of promoting union harmony, that they each withdraw their respective charges against each other. Both in this letter, and at hearing, Gilbert has acknowledged it was Tracy's right as Directing LR to assign a specific dlr to a LL; and as well, that a Directing LR may direct a distribution of a

leaflet to LL 707's membership without 707 LL consent. Gilbert offered in at least partial explanation of his earlier decision (presumably referring to the decision to lock dlr Fyles out of LL 707, deny him phone access, and obstruction in a timely distribution of a DL 91 leaflet to LL 707's members) that certain personal problems may have affected his decision (judgment) in the matter at the time. Gilbert however firmly maintained in the same letter that he was also motivated by the "private political meetings with groups of LL 707's membership" that Fyles had held; and Gilbert restated his own view that LL (officers) should have (prior) knowledge of the content of a DL leaflet to be distributed in the LL, even if it is to be distributed without LL consent.

Gilbert's explicitly stated concern in the letter however was as to the upcoming arbitration process on his own discharge grievance. Gilbert stated clearly his employment predicament: "I currently stand to be laid off July 1st with no job to go back to unless my arbitration case next month against P&W is successful. Gilbert then revealingly stated a concern he held over a possibility that unnecessary trial proceedings (to wit with Tracy), "could jeopardize the outcome." Significantly Gilbert testified (without apparent contradiction) that he was pretty sure the above Tracy-Gilbert, charge-countercharge remained pending in the subsequent material months of May-June 1983. There is no evidence to the contrary. Despite General Counsel's seeming desire to downplay it, Gilbert's summary acknowledgement that relations between Tracy and him were not friendly at time of genesis of his dlr resignation would fairly appear to be-understatement.

c. *Initial notice to DL 91 and Gilbert of the impending P&W layoff of employees, to be effective 3 June 1983 (Friday)*

At this time Romegialli serviced LL 707 (North Haven). Romegialli recalls that it was in the last week

of May 1983 that he first became aware of the impending P&W layoff of employees scheduled for 3 June 1983. Gilbert *first* learned of the prospective P&W layoff of employees through a P&W public announcement made but a few days to a week before the layoff, thus first learning about it (essentially as did Romegialli) in (very) late May, 1983. (On the basis of weight of evidence, I find, the announcement was probably made on either Monday or Tuesday, 30 or 31 May 1983.)

Romegialli saw the P&W prospective layoff list for North Haven. LL 707's Shop Chairman Gogliettino began a review of the layoff list. Romegialli explains the layoff affected employees with anywhere from 3 years to 18 years of seniority. The seniority issues were complicated. (DL 91 apparently perceived a need to seek a Court clarification on certain related seniority issues stemming from a 1960 strike.) Romegialli had personal involvement with overseeing not only the layoff as it affected LL 707's represented employees at the P&W North Haven plant, but also (partially) as the layoff affected LL 1746 A's represented employees at the P&W Southington plant.

d. *The arbitration hearing*

Gilbert's name did not appear on the (North Haven) layoff list; and understandably so, because P&W currently viewed Gilbert as a previously properly terminated employee. Gilbert and LL 707 however, were actively contesting Gilbert's discharge through grievances carried to arbitration at this very moment. Attorney James Kestell (and/or firm) was on general retainer by DL 91, and engaged by LL 707 to handle Gilbert's and LL 707's grievances on the 1982 discharge of Gilbert. These grievances had already been partially presented by a member of the firm in May 1983 before Arbitrator Alexander B. Porter. The arbitration hearing was scheduled for a completion in early June, thus pending an imminent completion when the P&W layoff was first publicly announced.

e. *The events of 1-3 June 1983*

The record is somewhat confused as to the precise chronology and/or interrelationship of certain material events that, in the main, I have no doubt *occurred* in the compacted period of 1-3 June 1983. Certain of Gilbert's recollections were (at least) not firm and convincing, if not simply on their face inconsistent. However, there were similar inconsistencies raised in the accounts of other involved union officers. I have carefully considered the accounts of all witnesses testifying in these respects, with purpose to discern where the weight of the more credible testimony lies, particularly on the matters which carry over more material significance to related later (recall/election) events in 1985. I have considered as well inherent probabilities and internal inconsistencies that reasonably appear from the more readily established facts. In the latter regard I have given particular weight to the clearly apparent circumstances that time was of the essence, and that the Gilbert and Tracy relationship (at best) had remained a strained one. Where other special observation is deemed warranted, it is noted. Accordingly, I now conclude and find that the following appears as the most likely order of the events that occurred during these material days, which led to a Gilbert submitted letter of resignation, the nature and the effect of which is in central issue.

By contract, stewards and safety representatives carry superseniority protection for purposes of layoff. At this time LL 707 member Wayne Cavanaugh was both a steward and a third shift safety representative at P&W's North Haven facility. Each such union position carried superseniority. Cavanaugh had no need to occupy both (protected) union positions to preserve his own employment status in a layoff under the terms of the contract. No currently employed employee could lay claim to a LL 707 designation (as safety representative) as a matter of

explicitly stated contract right. To the contrary, by explicit contract term, LL 707 alone had the right to designated the individual of its choice to occupy any (then) opening, or to be abandoned safety representative, position. LL 707's designatee however, had to be an active P&W employee. It is uncontested that (at this time) LL 707's president filled safety representative positions. (By subsequent LL 707 Bylaw amendment, and seemingly as an outgrowth of the very difficulties for all being described herein, a safety representative position is now filled by a LL 707 election, notably however, *still not by seniority.*) The instant dilemma arose from the following circumstances.

On (I find) 1 June 1983, shop chairman Gogliettino, who was at the time engaged in a review of the layoff list and related seniority issues, advised Gilbert that there was a possibility of a vacancy in the position of 3rd shift safety representative at North Haven. Although Gilbert's recollection in respect to source of that notice appears of record as tentative, in that Gilbert has testified only that Gogliettino *may have* been the one to have advised Gilbert of the possible opening, Gilbert's asserted recollection in that respect is both plausible, and stands uncontradicted. The record establishes that Gogliettino was currently active in reviewing the layoff lists; and Goglettino has not testified at all in this proceeding. Thus Gilbert's recollection, even though tentative, is congruous with other facts of record. Accordingly I find LL 707's shop chairman did advise Gilbert, probably on 1 June 1983 (Wednesday), that there was a possibility of a vacancy occurring in a 3rd shift safety representative at North Haven. P&W's layoff was to take place on 3 June 1983 (Friday).

It is centrally undisputed that to be returned to active employee status with P&W, Gilbert had to win his discharge grievance in arbitration. Even if he did so however, the interim P&W layoff would adversely affect a return of Gilbert to actual P&W employment because

Gilbert did not have enough seniority to avoid the 3 June 1983 P&W layoff. Even if successful in his arbitration proceeding, to be able to obtain an actual return to employment, Gilbert had to be in position to avoid the layoff of 3 June 1983. Thus from Gilbert's vantage point he could only do so if he occupied a position of superseniority; and he had to occupy such position before the 3 June layoff, for the LL 707 designation to be effective. In short, Gilbert had to be designated by LL 707 as its 3rd shift safety representative before the end of the day, (as Gilbert relates) 3 June 1983 (Friday), if not earlier 2 June 1983. In either event, time was clearly of the essence.

It is undisputed that Gilbert met with attorney Kestell. It is unclear of record whether this meeting was a meeting previously scheduled in final preparation for the imminent completion of the arbitration hearing, or had been but recently arranged by Gilbert upon learning of the possible third shift safety opening. In either event, Gilbert on this occasion promptly brought to attorney Kestell's attention that there was the *possibility* of a 3rd shift safety representative opening at North Haven.

Gilbert acknowledged that it was possible, indeed likely, that Kestell had advised Gilbert that Gilbert couldn't simultaneously hold both positions (DL 91 dlr and LL 707 safety representative). Gilbert however asserted that he thought that the latter Kestell advice had occurred because someone else in the organization had first told him that he couldn't hold dual union positions where as he had at first though he could. Gilbert had initially attributed the statement to Tracy in a (second) conversation recalled held between Gilbert and Tracy in Tracy's office. Gilbert then recalled it was a result of Tracy making such statement that Gilbert had then asked Tracy for an early layoff. But Gilbert had also previously related that in an initial and prior conversation with Tracy over the phone he had then asked for an early layoff. Tracy testimony does not appear to address circumstance of an earlier phone call

from Gilbert, but confirms there was a heated discussion between them in his office in the afternoon of 2 June 1983 in which Gilbert *first sought* an early layoff. Gilbert had additional recollection that the office conversation with Tracy was either on the day following the phone conversation, or the same day, but he also thought in the afternoon.

Gilbert (I find) essentially acknowledged, after review of prior affidavit, that attorney Kestell had advised Gilbert that it would help Gilbert's position in the arbitration proceeding to be appointed as 3rd shift safety representative by LL 707 *before* the conclusion of Gilbert's arbitration hearing; that Gilbert couldn't hold both positions at the same time; that it would be necessary for Gilbert to remove himself in one way or another as dlr before being appointed LL 707's third shift safety representative; and that he then went to Tracy and asked for an early layoff.

In the end, I am persuaded by the weight of credible evidence that there were two conversations between Gilbert and Tracy; the first over the phone, and the second in Tracy's office, and that both conversations of Gilbert with Tracy occurred on the same day, (I find) 2 June 1983, *and* that they more likely both occurred after Gilbert had first already spoken to Kestell about the safety representative opening. I further find the call to Tracy was likely placed after Kestell had already spoken to others, namely Romegialli and Gogliettino, and made arrangements for LL 707's timely designation of Gilbert, with Gogliettino.

Given the strained relationship that continued to exist between Tracy and Gilbert, and given that it was readily apparent to Gilbert that time would be of the essence in the matter, I do not believe that Gilbert would have broached the matter of a possibility of a LL 707 designation of Gilbert as its 3rd shift safety representative initially with Tracy, rather than promptly bring it to the

attention of attorney Kestell. A call to Tracy thereafter would appear the more plausible on that account alone. Moreover, Gilbert's recollection otherwise was one of informing Tracy in the phone conversation that LL 707 *was offering* him a superseniority position. Gilbert also testified specifically that he didn't ask Tracy for early layoff before he knew he was going to be designated. It seems inherently likely as correlary of that credited recollection, that Gilbert spoke to Tracy over the phone only after Kestell had communications first with Romegialli, and then with Gogliettino, through whom the arrangements were eventually made for a LL 707 designation by acting president Nixon, *infra.*

Romegialli has testified relatedly (*at least initially*) that in the morning of 2 June 1983 he received a call from attorney *Kestell and Gilbert.* Kestell told Romegialli to talk to LL 707, and get Gilbert appointed as LL 707's safety representative, because the appointment would have a bearing on the outcome of Gilbert's termination grievance, if Gilbert was returned to work. Kestell wanted Romegialli to accept a related letter (to be dictated) over the phone.

Significantly Romegialli testified that he at this time disagreed with Kestell; and he also declined to take a Kestell (dictated) letter over the phone. According to Romegialli, during their conversation Kestell asked for Romegialli's reasons. Romegialli has testified that he told Kestell that it was his best belief that to accept (sic) Gilbert as safety representative at that time was preferential treatment; that LL 707 would be open to a charge from another employee of the Company; and he did not want to be a party to it. Romegialli relates that he also reminded Kestell of a recalled similar circumstance in the past where Romegialli had desired to appoint as steward an individual who had been a steward two years earlier; and that Kestell had effectively prevented Romegialli from doing so, telling Romegialli at the time that it was

"preferential treatment." Romegialli relates that he then told Kestell, "You told me I can't do it here (sic), and now you are demanding I do it now. I am not going to be part of it. If you want to talk to someone, you talk to *Goglietino and Nixon.*"

In passing I note Gilbert has testified credibly that only LL 707's president, (then) Nilson, could make the appointment of safety representative; and Gilbert was firm in recollection that Nixon was (then) vice president. Gilbert acknowledged otherwise that the vice president was in charge or correspondence to P&W. However, Gilbert recalled that there was a time when Nilson was not there, and Nixon had acted as president; and it could have been and (I find) was so, at this (brief) time. Moreover, Gilbert has clearly testified that Nixon was acting as president in sending the safety representative designation discussed *infra*. There is no contention by Union to the contrary. I find Romegialli's suggestion that Kestell talk to Goglietino and Nixon, appears the more plausible. I further find that Kestell did talk to Goglietino and the arrangement was made through Goglietino.

Romegialli subsequently related that he did not receive a phone call from Gilbert, but that earlier that morning Gilbert came into LL 707's hall to see Romegialli; and that they had a very brief discussion. It is Romegialli's stated recollection that on this occasion Gilbert told Romegialli that *he was resigning his position as dlr effective 2 June 1984*, and that he would like to be considered for appointment by LL 707 as its 3rd shift safety representative. Romegialli asserts that Gilbert had then asked Romegialli to speak to LL 707's shop chairman *Goglieltino, president Nilson and vice president Nixon* about the designation. Romegialli asserts that he told Gilbert at the time that he thought Gilbert was crazy for giving up his dlr position. Gilbert had initially testified that the only time he said he resigned was to Tracy. On rebuttal Gilbert testified that he had no recollection of ever tell-

ing Romegialli that he resigned; and that he had no recollection of Romegialli ever speaking to him negatively about the procedure. Romegialli acknowledged that Gilbert never told Romegialli it was a conditional resignation.

There is substantial inconsistency between Romegialli's recall of a Gilbert statement of resignation to him as made in the morning of 2 June 1983 and Gilbert and Tracy mutual account of a confrontational conversation that afternoon in which Gilbert vigorously first sought an early layoff by DL 91 before, upon Tracy refusal, Gilbert heatedly said he would resign. Romegialli's asserted recollection of a Gilbert stated resignation earlier *that morning* is not internally consistent, and it is not credited. Notably, Romegialli would have been fully aware that same day of the content of a letter prepared for Nixon's signature, next discussed, which refers to a Gilbert resignation, but also a union *conditional* acceptance.

Asserting credibly (otherwise) that it was a result of attorney Kestell's call during the morning of 2 June 1983, Romegialli testified that he then talked to LL 707's shop chairman Goglielmino who was at work, but scheduled to come to the hall at 11 a.m. to finish his review of the P&W layoff list. Romegialli relates that when Goglielmino arrived at LL 707's hall, Romegialli placed a call to attorney Kestell, and Goglielmino then spoke directly to Kestell. Romegialli recalled that it was later in the afternoon of the same day that Goglielmino brought back to LL 707's hall the typed letter that had been prepared for vice president Nixon's signature.

The letter thus prepared for Nixon's signature is dated 2 June 1983. It is addressed to D. A. Telesca, P&W personnel manager. Insofar as pertinent it provides:

> This is to notify you that Local Lodge 707 has removed Wayne Cavanaugh, clock No. 251678, dept. 2666, as third shift Safety Representative, effective

immediately and in his place has designated Wayne A. Gilbert—clock No. 244646, as third shift Safety Representative, effective immediately.

Mr. Gilbert has submitted his resignation as Labor Representative effective immediately. Accepted conditioned only upon your written acceptance and acknowledgment of him as Local Lodge 707's third shift Safety Representative.

Romegialli, upon his review of this letter (alone) could have reasonably concluded at *this* time that Gilbert had submitted an (unqualified) resignation, that was however yet to be accepted by the Union.

i. *LL 707 designation of Gilbert as safety representative*

When Gilbert resigned as LL 707 president on 30 July 1982 to become DL 91 dlr on 1 August 1982, (then) vice president Nilson became president. Nixon testified that he was initially *appointed* vice president (presumably by Nilson); and thereafter elected vice president in October 1982. Nixon also recalled that Nilson wanted Gilbert reassigned from LL 707 because Nilson felt Gilbert was making decisions without consulting Nilson. Nixon confirms he was vice president in June 1983. Nixon asserts there was no friction at this time between Nixon and Gilbert.

Nixon testified that on 2 June 1983 he was working at P&W's North Haven plant when he received a notice through P&W's personnel (office) that he was to call LL 707's office. Nixon recalled that the call was in regard to putting Gilbert on as health and safety representative. Shop chairman Gogliettino and dlr Romegialli told Nixon they'd explain when Nixon got to the hall. Nixon asserts that when Nixon arrived at the hall, they (Romegialli and Gogliettino) told Nixon that they were going to put Gilbert on as health and safety representative.

At hearing Nixon has asserted that he immediately *opposed* LL 707's designation of Gilbert as safety representative because there was a layoff coming and (he felt) it was not morally right. According to Nixon, Romegialli and Gogliettino told Nixon at the time that they had talked to attorney Kestell; and that the language was already typed up. (Gilbert confirmed the Nixon letter was authored in all or part by Kestell.) Nixon relates that Romegialli and Gogliettino told Nixon, "We have to show we are backing Mr. Gilbert by signing this letter." Nixon asserts he signed the letter under protest. Romegialli has confirmed (but only generally) that Nixon was initially reluctant to sign the letter, but after some further discussion Nixon signed it.

Nixon has essentially asserted that he signed the designation of Gilbert as LL 707's safety representative only under protest. In contrast with the letter which designated Gilbert as LL 707 safety representative, prepared by LL 707's attorney, and signed by Nixon, there is no formal record or documentation of a Nixon protest, indeed no documentation of any type at all proffered to support Nixon present assertion of having made objection to LL 707's appointment of Gilbert at the time. Moreover it is warranted to observe that the first documentary evidence indicating any LL 707 concern in the area of its own designation of Gilbert as safety representative in respect to its potential effect on another employee, does not surface until some 4 months later, in early October 1983. It occurs then only after Gilbert and LL 707 have obtained a favorable award from arbitration, and after a dispute has developed between LL 707 and P&W specifically with regard to a LL 707 contention that P&W has failed to fully comply with the arbitrator's award, *infra*. It arises in context of an additionally filed noncompliance grievance, and a question whether LL 707 should press beyond LL grievance steps already held on the (noncompliance) grievance, and at level and time of DL 91 dlr Romegialli presentment.

There is much warrant to question whether Nixon protested the designation of Gilbert at the time, let alone for the reason he now asserts.

The versions of Romegialli and Nixon on close analysis independently appear strained, if not inconsistent. Nixon's version is essentially a portrayal of Romegialli and Gogliettino as both urging that Nixon do something that Nixon thought was morally wrong and that he did not want to do. Nixon has *not* based his reluctance on lack of his own authority. Indeed Union does not contest the fact that Nixon made the designation with authority as acting president. Surely as vice president, let alone as acting president, shop chairman Gogliettino had no authority over Nixon to direct Nixon to designate Gilbert as LL 707's safety representative, if Nixon truly did not wish to do so at the time. Nixon testimony also has Romegialli pressing Nixon to designate Gilbert over Nixon's own judgment, and the record contains Romegialli contrary assertion that he earlier had refused to be any part of it. Nixon testimony effectively portrays Romegialli as urging Nixon to do exactly what Romegialli asserted he personally wanted to have no active part in. Neither Gogliettino or Nilson have testified, and thus do not corroborate Nixon, and Romegialli does at best, only generally. This is not very convincing testimony; and I do not credit it. Rather I find that Gilbert at that time *was LL 707's choice* as its 3rd shift safety representative position, just as the designation letter that Nixon has signed at the time states plainly on its face.

Weight of evidence also convinces me that it was after Kestell conversation with Gogliettino that Gilbert first called Tracy on the phone; and (I find) it likely that on that occasion Gilbert first informed Tracy that LL 707 *was offering* him a super seniority position in the North Haven facility. Whether at this time Gilbert (still) thought he could hold both positions, and it was Tracy who first informed Gilbert (over the phone) he

couldn't (and Kestell then confirmed it) or someone else had earlier (e.g. attorney Kestell and/or Gogliettino) is not significant. What is significant is that Gilbert in this phone conversation (I find) asked Tracy for an early layoff and Tracy said he wouldn't approve that; he didn't think it was fair. The record is silent as to communication between Romegialli and Tracy, or vice-versa, though such is surely likely at some point.

Gilbert subsequently visited with Tracy in Tracy's Office (I find) that very afternoon and discussed the matter further. I do not credit Gilbert's recollection to the extent it portrays this subsequent face-to-face conversation with Tracy as being only incidental to a Gilbert visit to district headquarters made for some other purpose. Rather under the total circumstances I find Gilbert's visit to district headquarters was with paramount purpose to press Tracy further; to try to persuade Tracy to allow an early layoff; and I find Tracy's version of the driven nature of Gilbert's arrival at the office to engage Tracy in such a conversation, is also the more plausible, even with an allowance made for the nature of their continued strained relationship in his account.

Tracy thus testified that Gilbert came busting into Tracy's office in a very arrogant manner, without an appointment. Tracy acknowledged that usually the door to his office is open; that his was a fairly informal office; that dlrs regularly just walk in; but when his door is closed for business, dlrs (first) knock. Tracy testified that on this occasion his door was closed, and Gilbert "busted in."

Initially Tracy's version of Gilbert conversation recounted details only of a flat Gilbert resignation, namely: that Gilbert had resigned; there were no conditions stated by Gilbert at the time; that Gilbert demanded Tracy accept Gilbert's resignation; and that Tracy insisted the resignation be in writing.

Upon further examination however, Tracy soon revealed that Gilbert was very upset at the time; and that Gilbert told Tracy that Tracy had an obligation to help Gilbert fight the Company. Moreover, Tracy very significantly confirmed that *Gilbert first demanded that Tracy lay Gilbert off early on 2 June 1983* because Gilbert wanted to go back to work for the Company. Gilbert also told Tracy that *LL 707 was in process of appointing Gilbert as its safety representative on third shift.* Gilbert told Tracy that he needed the job; that he was having family problems; and that if LL 707 succeeded in appointing Gilbert as its 3rd shift safety representative, Gilbert would have his job on third shift.

To the extent other Tracy testimony reflects that Gilbert said that he would have the job at the expense of someone else being laid off, I do not credit such a statement as attributed to Gilbert, but rather view it as Tracy asserted summary of Tracy's own view of Gilbert's arguments made to Tracy. Moreover, I credit Gilbert as to the points he attempted to first make to Tracy for Tracy's grant of an early layoff by DL 91. Thus I credit Gilbert testimony that he was only asking that Directing LR Tracy expedite, or push up the date of Gilbert's layoff by DL 91; and that he informed Tracy that *he had spoken* to attorney Kestell *and* the *LL 707 shop chairman about it.* (Both the phone call and meeting with Tracy were after Kestell made the arrangements with Gogliettino.) Gilbert account has Tracy *again* say he was not in favor of an early layoff; and that he didn't think it was fair.

Gilbert next argued to Tracy that union representatives are protected by superseniority all the time, especially union representatives who have put in a lot of DL or LL service; and that it was nothing out of the ordinary. (It was out of the ordinary in one sense; this opening and appointment were occurring only after a publicly announced P&W layoff.) Gilbert has Tracy say that

even if Gilbert got the (LL 707) appointment to safety representative, Gilbert wouldn't have it, because Gilbert couldn't hold the two positions at the same time, it was contrary to policy. (Romegialli has testified that neither he, or any dlr has inplant visitation rights; and, that since 1974 the Union has been unsuccessful in seeking to obtain such rights in negotiations. Poulin has testified it would be very unusual if P&W were to allow a dlr to function as a safety representative in the plant; and P&W was very rigid on *LOA*.)

Gilbert's version is that Tracy first told Gilbert that Gilbert would have to resign (as dlr) before he could be (LL 707's) safety representative. Gilbert has testified that it was at that point that he very heatedly told Tracy that if that was the only way to secure his employment and protect his family, that Tracy would have a resignation. According to Gilbert, Tracy then told Gilbert to put it (the resignation) in writing; and that *he wasn't going to accept the resignation, unless it was put in writing.* Gilbert acknowledged that he was very upset at the time, explaining that all the arrangements had to be made by 3 June 1983.

In regard to Gilbert's assertion of a heated conversation, I also credit Tracy that in the conversation Tracy had with Gilbert in Tracy's office that afternoon, and (I find) very likely on occasion when Tracy reaffirmed (with finality) to Gilbert that Tracy would not layoff Gilbert early, that Gilbert proceeded to call Tracy all kinds of names, including telling Tracy that Tracy was a no-good son-of-a-bitch; that he (Gilbert) was trying to get back to work with the Company; and that Tracy was more concerned about the g—damn Company. Tracy's version otherwise summarized that Gilbert tore Tracy up one side, and down the other; that Gilbert was in a complete rage; and that Gilbert acted like a maniac. *Tracy confirms that he then told Gilbert that the only thing Tracy would accept from Gilbert was a resignation; that*

Gilbert was to give it to Tracy in writing; and that Gilbert should get the hell out of his office.

Tracy relates that he (Tracy) was also very upset; and that he was upset (with Gilbert) because he didn't think it was proper to have a more senior employee laid off from the Company. At hearing Tracy stressed that this was not instance where Gilbert would receive the appointment (as LL 707's safety representative), and it would not impact on another employee. Tracy has testified unequivocally that if Gilbert was appointed as 3rd shift safety representative, Gilbert would be responsible for the layoff of another employee who was more senior to Gilbert. At hearing Tracy essentially asserts he refused to lay Gilbert off early for that reason. However, Tracy then went on to relate (wholly unconvincingly) that he made it very clear to Gilbert that Tracy had been instructed by the International that the layoff would take effect on 1 July 1983. Tracy's forcing of Gilbert to submit a letter of resignation is not charged (then, or now) as an independent unfair labor practice. However, discernment of the effects of the resignation as first heatedly stated, and then as submitted are material.

International did not direct a layoff at all. But even more to the point, it is difficult to envision how an early layoff of Gilbert would have detracted from International's directive on cessation of funding support for 3 dlrs in DL 91 on 1 July 1983, which was with clear purpose to reduce Union's expenses in the first place. Put simply, an earlier layoff of Gilbert would have certainly been compatible with that purpose. Tracy unquestionably had other purpose in mind that he intended to be served in refusing Gilbert's request for an early layoff, other than the proffered distorted preservation of International directive that a reduction in staffing expenses be effective on 1 July 1983.

With such an unconvincing, if not false reason being thus clearly advanced as part of the proffered explana-

tion, warrant clearly arises to question even more basically whether Tracy's real purpose in his refusal of Gilbert's request for early layoff was, as stated, the concern Tracy asserts he held that a LL 707 designation of Gilbert as its safety representative would result in a layoff of a more senior employee at North Haven, or, whether Tracy refused early layoff of Gilbert, for another and clearly not as justifiable a reason, namely to take advantage of an opportunity that seemed to have presented itself to Tracy, whereby Tracy might effectively rid himself of Gilbert (as a dlr), who had earlier proven to be, and continued as an unresolved antagonist to Tracy's exercise of Directing LR authority. In any event, (I find) Tracy effectively forced Gilbert into a choice of resignation of his dlr status, by denial of Gilbert's request for an early layoff. In that respect, it would appear warranted to note once again Judge Learned Hand's oft-quoted observation in assessing matters of motive, *viz.* that, ". . . nothing is more difficult than to disentangle the motives of another's conduct—motives frequently unknown even to the actor himself." *Universal Camera Corp.*, 190 F. 2d 429, 431 (1951).

There is otherwise quite considerable support of record for the presence of the latter as Tracy's operative motivation, not the least of which is the circumstance that it is LL 707's province, through contractual authority, to designate the individual of *its* choice as *its* safety representative; and that it does not, even now, do so on the basis of seniority. Tracy has thus otherwise collectively testified to his awareness of essentially all of the attendant circumstances. Thus Tracy knew P&W had terminated Gilbert a year ago; that LL 707 had not accepted P&W's termination of Gilbert who at the time of termination was its president; that LL 707 (as well as Gilbert) for a long time, and presently, was vigorously fighting to clear Gilbert's (employment) record of that termination, and to get Gilbert reinstated; that in that

respect, LL 707 was seeking payment of full backpay and benefits; that (although) backpay would not be applicable during a LOA period, P&W had denied DL 91's earlier request to put Gilbert on LOA, and did so on the same basis, that Gilbert was not an employee; that Gilbert and LL 707 grievance(s) seeking reinstatement was (were) currently being arbitrated; and that the arbitrator had not as yet rendered a decision. Tracy additionally knew that DL 91 was going to lay Gilbert off as dlr very shortly thereafter, effective 1 July 1983; that P&W had only very recently announced that its own layoff of employees would take place in the interim on 3 June 1983; that Gilbert would be effected in the P&W layoff of employees at North Haven unless prior to the time of the P&W layoff on 3 June 1983, Gilbert occupied a superseniority position, such as LL 707's safety representative; that there was a 3rd shift safety representative position (effectively opening) at the North Haven plant (for someone) at this time; that LL 707 had a contractual r'ght to designate an active P&W employee of LL 707's choice to serve as its 3rd shift safety representative; that LL 707 intended to designate Gilbert as its 3rd shift safety representative, and (although) P&W did not presently recognize Gilbert as an active employee, LL 707's successful arbitration of the related Gilbert discharge grievance(s), together with an arbitrator's directed reinstatement, would effectively change Gilbert's terminated status to that of an active employee status, and do so timely, thus back to 30 June 1982; that LL 707 *present* intention was to *timely* designate Gilbert as its 3rd shift safety representative, *before* P&W's layoff of employees was effected on 3 June 1983; and that LL 707 intended to thereafter press for Gilbert's actual return to employment, and for his service as its designated 3rd shift party representative; that P&W had never extended LOA status to Gilbert; that the only thing that would hold up or prevent an effective LL 707 designation of Gilbert as its 3rd shift safety

representative was that by longstanding practice and custom, P&W would not recognize a DL 91 employed dlr as a P&W active employee whom LL 707 could designate as its safety representative; and thus, that designation by LL 707 of Gilbert to be its 3rd shift safety representative, to be effective, could only be made if Gilbert were not actively employed by DL 91 as a dlr on or before 3 June 1983, which in turn could only be accomplished by either DL 91's earlier layoff of Gilbert from the dlr position, or, by Gilbert's own earlier resignation from that position.

Tinella subsequently returned to employment at P&W without resigning his dlr status, upon release from LOA status. At this time P&W LOA status was not a problem for Gilbert since P & W had not placed Gilbert on LOA when DL 91 had requested it, because P&W viewed Gilbert as a properly terminated employee. Moreover, the record reveals that Tracy has, at different times, made a number of tenure accommodations/arrangements to assist other dlrs and staff members, but most notably for Tinella. The arrangement made for pension vesting has been earlier noted. Even more significantly, after Tinella was laid off by DL 91 on June 1983, Tinella obtained employment with P&W, with an assistance from Tracy, who was successful in requesting that P&W release Tinella from the earlier grant of LOA status to serve as dlr. Called as a witness by General Counsel Tinella confirmed that he returned to work at P&W's Southington plant as a grinder shortly after his layoff on 1 July 1983. Moreover, Tinella thereafter held various union positions, including serving as (alternate) delegate to DL 91. In contrast with Gilbert, Tinella acknowledged that *no DL 91 official had asked Tinella to resign his dlr position from which he was laid off; and Tracy confirmed that Tinella was not required to do so.* Tracy also confirmed that he (Tracy) was instrumental in getting P&W to release Tinella from the (contractually) granted

LOA status that extended through 30 April 1986, so that Tinella could go back to work for P&W.

Tracy has offered accurate, but not wholly explanatory distinction that Tinella did not have Gilbert's (non-employee) problem with P&W. E.g., Tracy's proffered explanation does not address the circumstance that Tinella was not required to resign his laid off status. P&W viewed Tinella's position different than Gilbert's not on dlr layoff status, but on the basis that a release of Tinella from LOA status did not adversely impact on any (then) P&W Southington laid-off employees. In other words, Tinella had more seniority than Southington employees then on layoff. It was otherwise with Gilbert. After arbitrator Porter ordered Gilbert's reinstateemnt, P&W extended (only) dlr LOA status to Gilbert (though Gilbert by then was on DL 91 layoff) but refused to extend recognition to Gilbert as a LL 707 timely designated safety representative, to be discussed further *infra*. What in the end is notable of the Tinella P&W employment from DL 91 vantage point, and Tracy's part in it, is that neither Tracy or DL 91 required Tinella to resign his (laid-off) dlr status either to obtain P&W employment, nor after Tinella later occupied LL union position(s). There is thus strong evidence to indicate that Tracy had at least dual motive, including motive to force Gilbert into a resignation, if Gilbert was to pursue LL safety representative position.

However, whatever Tracy's real motivation was in forcing an initial choice upon Gilbert of a resignation, Tracy's initial acceptance of the *conditional* resignation submitted in writing by Gilbert is wholly consistent with DL 91's subsequent retention of Gilbert in DL 91 employ until 1 July 1983. The fact is, Tracy *did not accept* Gilbert's initial resignation when first orally stated. Tracy's subsequent acceptance of an earlier orally stated Gilbert resignation was effectively thwarted by a combination of the additional circumstances that Gilbert's resignation, *as subsequently tendered in writing*, after discussion with

Kestell, was submitted with a *clear condition precedent* (next discussed). (That condition would remain unmet with P&W's steadfast refusal to recognize LL 707's designation of Gilbert as its third shift safety representative (even in Settlement Agreement, *infra*).

ii. *Gilbert's written submission of a clearly conditional resignation*

Tracy confirmed that Gilbert told Tracy that Tracy would have Gilbert's resignation in writing. Tracy believed that Gilbert had told Tracy that Tracy would have it the following day, though Tracy acknowledged the letter may have been delivered to his office later the same day (2 June 1983). Tracy explained that after Gilbert left the office, Tracy was personally so upset by Gilbert's visit that Tracy had to leave the office. Webber testified that at this time Tracy, who had come back earlier than he had to, was still very ill. DL 91 did not at this time have the assistance of a glr (Almeida). Webber (then) a dlr, also served as Tracy's assistant. Webber testified that she was there when Gilbert came in. Webber corroborates (generally) that she heard Gilbert say he resigned. However, though Webber has testified that she performed some of Tracy's duties, including handling some of Tracy's mail, Webber testified she was *not* aware of Gilbert's actual letter of resignation, until much later, discussed *infra*. Weight of credible evidence convinces me that Gilbert's letter or resignation was hand-delivered, and placed on Tracy's desk the next day, 3 June 1983. I further conclude and find that Tracy likely reviewed the Gilbert letter of resignation that day. Thus Tracy recalled that he saw the letter from Gilbert (without envelope) in the middle of his desk; and he believed he looked at the letter at the time. I have no doubt Tracy was fully aware of its content at that time. Gilbert's letter to Tracy dated 3 June 1983, provides:

> I am requesting that my layoff as a Labor Representative be effective June 2, 1983 contingent upon

the outcome of my current grievance arbitration case and the Company's acceptance of the Union's appointment of myself to Safety Representative.

If it is absolutely necessary I will resign my position as Labor Representative contingent again, upon the conditions above with the same effective date.

My family and myself trust that you and your office will do everything in your power to protect my job seniority against this union busting corporation.

Gilbert testified that after discussion with attorney Kestell, this letter was jointly authored by Kestell and Gilbert, though apparently initially drafted in longhand, and later actually typed in DL 91's office. The Gilbert letter reflects that it was hand-delivered, and that a copy was also provided to Mel Tripp (then) DL 91 president. Tripp did not testify; and thus DL 91 has not denied immediate receipt of the letter. There can be no question that responsible DL 91 officials were immediately aware of Gilbert's resignation, *and* its terms, on or shortly after 3 June 1983.

It is General Counsel's and Gilbert's position that the above letter of resignation as submitted was clearly conditional, and that the resignation was never effectuated because the stated required precondition, namely Employer's recognition of LL 707's designation of Gilbert as safety representative has never occurred. Gilbert has also testified that he never tended any other resignation. Gilbert testified relatedly that he has never thereafter served as 3rd shift safety representative at P&W's North Haven facility, nor has he ever been recalled as DL 91 dlr.

P&W's personnel manager Telesca replied immediately to Nixon by letter of 3 June 1983, pertinently:

Article XXVI, Section 1, of our current labor agreement provides that "Union safety representatives shall be active employees of the company." Mr.

> Gilbert is not an active employee of the company, and, therefore, he is not eligible to act as a safety representative and the company will not recognize him in that capacity.

It is apparent therefrom that P&W immediately denied the LL 707 safety representative designation of Gilbert at that time, *solely* because Gilbert was deemed a not active (properly terminated) P&W employee.

The record establishes clearly that neither Tracy, or DL 91 actually implemented Gilbert's resignation as effective on either 2 or 3 June 1983. General Counsel submits additional documentary evidence (G.C. Ex. 8) that firstly establishes that on Monday, June 13, 1983, thus well after Tracy's and DL 91's receipt and review of Gilbert's submitted written letter of resignation, Directing LR Tracy then recommended for approval of DL 91's Executive Board and Delegate Body, *inter alia*, that:

> 4. Regretfully Labor Reps. Gilbert, Tinella and Robert Fleeting be laid off on June 30, 1983 (midnight).
>
> 5. Suggest District 91 Fund Raisers in hopes of recalling those laid off representatives.

General Counsel also documentarily established that DL 91 subsequently submitted a form to the State which reports: (a) Gilbert's last day *worked* as 30 June 1983; and (b) reflects the reason assigned for Gilbert's unemployment as being a reduction in employment caused by International layoff. Equally significant, a block on the same form entitled "voluntarily leaving" is left blank. To extent Tracy has sought at hearing to explain away these contemporaneous business entries, *inter alia*, with specific claim now advanced that Tracy at the time had only wanted to ensure that Gilbert would be able to receive unemployment compensation, I find all such assertions simply wholly unconvincing. General Counsel would additionally rely on a certain written stipulation (G.C. Ex. 16) entered by the same parties when appearing before

ALJ Lawrence in hearing held on 15 November 1984, namely that, "9. On or about July 1, 1983, Gilbert was laid off from his position as a labor representative with District 91."

preliminary analysis

In the end, whatever may have been Tracy's real motivation in refusing an early layoff to Gilbert, he stated a willingness to only accept a written resignation from Gilbert. Thus regardless of the circumstance that Gilbert appears to have first orally stated (albeit clearly heatedly and reluctantly) resignation on 2 June 1983, without explicit condition, that oral resignation was clearly not one accepted by Tracy. The above documentary evidence submitted by General Counsel is wholly persuasive that, at least prior to arbitrator's award in September 1983, and related grievance developments, Tracy himself did *not* thereafter act in any manner on Gilbert's resignation, other than it being as the one submitted in writing, i.e., one conditional, with its stated condition unmet.

For all of the above reasons, I presently conclude and find that DL 91, and Tracy in particular initially construed Gilbert's written letter or resignation as constituting at best a resignation with a precondition that remained unmet; that the resignation remained unacted upon by Respondent DL 91 clearly through 30 June 1983, and as clearly through arbitrator Porter's award of 7 September 1983. A further observation is warranted in regard to Tracy's recorded separate recommendation made on 13 June 1983 that dlr Robert Fleeting (alone) be recalled on 1 May 1984.

In regard to Fleeting recall recommendation, I credit the somewhat tenuous recollections of (former) Directing LR Tracy only to the extent they are compatible with the more definitive and convincing testimony of Tracy's successor, (current) Directing LR Betty Webber. Thus Webber's related testimony has convinced me that the

above reference to a recall of Fleeting on 1 May 1984 essentially related to a very unique and (then) unclear circumstances facing DL 91 at the time.

At this time there were a number of other (non-UTC) employee units represented by LL(s) then affiliated with DL 91. Fleeting, who came out of one of these LLs and was not a UTC employee, serviced these LLs. All of the other elected dlrs were employees of UTC on LOA, excepting Gilbert only because of discharged status. I credit Tracy's and Webber's recollection to the following extent: that it was not clear at the time that DL 91 would be able to secure an agreement from P&W (or UTC) that one of the dlrs who were P&W (or UTC) employees on LOA to serve as a dlr, could serve *continuously* as a dlr assigned to service these other (non-UTC) units of employees. Webber's testimony is also credited that it was in the event that DL 91 was unable to secure such agreement, that Tracy had there recommended as Directing LR that DL 91 Delegate Body consider a recall of Fleeting who did not have the problem the other dlrs would face. The problem the other dlrs faced was a possible forfeiture of their employment tenure with P&W (or other UTC company).

In fact, the prematurely raised issue of specialized consideration for a 1 May 1984 recall of Fleeting was subsequently wholly mooted by: (a) P&W allowance of a currently employed dlr (Maurice Rondeau) on LOA (from UTC's Hamilton Standard) to serve these LLs; and (b) a transfer/affiliation of these LLs in the interim to another DL. Indeed, the parties stipulated that on or about 1 February 1984 Fleeting transferred (along with his own LL) to another DL. Fleeting thereafter ran for dlr in that (new) DL, and won election to dlr. Materially, the parties are in full agreement that prior to the initial recall in question in March 1985, Fleeting had already foregone any and all right to further employment by DL 91. Fleeting's circumstance is not in issue.

The circumstances underlying a DL 91 recall of Tinella for his unexpired dlr term on 11 March 1985, over Gilbert who (I have found) had greater DL 91 seniority, is the issue; and, in issue as well as DL 91's additional failure to recall Gilbert to even a second dlr position that subsequently opened when Webber was elected Directing LR. (Tracy retired and did not run for reelection). On that occasion, Webber vacated her own dlr position. Webber's dlr position which thus opened, was not filled by a recall of Gilbert, but was filled by an elective process held on 12 June 1985, though, so General Counsel contends, Gilbert still remained on DL 91 layoff, and had unexpired term as an elected dlr with tenure extending effectively through 30 April 1986. The central issue in contention is whether Gilbert remained in dlr layoff status after the arbitrator's award, and was not recalled as DL 91 dlr, because of Gilbert's interim 1983-1984 intraunion conduct that was critical of union officials, and because Gilbert filed charges against the Union, and gave testimony in support of the charges, and at hearings in 1984.

Romegialli testified that LL 707 subsequently took a strong position on its appointment of Gilbert to third shift safety representative. I find it did, but not without questions of union politics having arisen. As noted, on 7 September 1983, Arbitrator Porter issued his decision in which the Arbitrator, *inter alia*, reduced a certain P&W 10 June 1982 suspension of Gilbert to a disciplinary warning, and, more significantly, set aside P&W's 1982 termination of Gilbert. The Arbitrator remedially directed as follows:

> The company is directed to reinstate the grievant and to compensate him, in the manner indicated in the Opinion just above, for the improper suspension of June 10 and the improper termination of July 1.

General Counsel's evidence (G.C. Ex. 16) includes the aforementioned Stipulation entered before ALJ Lawrence. Contained therein is all party further agreement that by

letter dated 9 September 1983, the Employer *notified Gilbert*, that in conjunction with the Arbitrator's decision, Gilbert ". . . was being reinstated as an employee on leave of absence from August 1, 1982. . . ." The stipulation further declares, that by letter dated 14 September (I find) 1983, the Employer *notified LL 707* that in compliance with the arbitrator's decision, ". . . it was reinstating Gilbert to a leave of absence, and that because of the June 3, 1983 layoff, it was not possible to reinstate Gilbert to active employment with the Employer." When, from LL 707's view, the company did not fully comply with the arbitrator's decision, in that P&W effectively did not recognize LL 707's pre-layoff designation of Gilbert as LL 707's third shift safety representative, LL 707 promptly filed a (non-compliance) grievance on 15 September 1983. The (non-compliance) grievance was prepared by attorney Kestell, but signed by president Nilson. (It should not be overlooked that neither president Nilson or vice president Nixon were oblivious to the import of P&W firing Gilbert while president of LL 707.). This non-compliance grievance was in due course pursued through the parties' 4-step grievance procedure; and eventually, on to a Court enforced (alternative) arbitration that led to a 5 February 1986 Settlement Agreement on that and certain other matters, under circumstances and with effects to be discussed further *infra*. I only presently note that on 21 September 1983, LL 707, through attorney Kestell, also filed an 8(a)(1), (3), (4) and (5) charge against P&W in Case No. 39-CA-1824, essentially on the same basis, namely, Employer's refusal to comply with the Arbitrator's decision. This case was one of four NLRB cases (along with a number of other grievances) to be covered by the aforesaid Settlement Agreement reached on 5 February 1986, and with all said NLRB cases (apparently) subsequently withdrawn. *None are active; and none are litigated herein.*

Presently, I address the pertinent grievance steps. Step 3 of the grievance procedure held on LL 707's base (non-

compliance) grievance was held on 23 September 1983. There the Company *formally* answered in writing (only) generally that the grievance was improper, and that the Company had complied with the arbitrator's decision. The next step, step 4, would involve DL 91 (Romegialli) presentation.

Respondent produces documentary evidence of an interim development of internal union concern on the part of certain of LL 707's officers. The documentation indicates as well at this time a question of internal union politics. This evidence is in the form of a letter (dated 6 October 1983) from attorney Kestell to then president Nilson, in which attorney Kestell confirms in writing, at a (referenced) request made by shop chairman Gogliettino, that if Gogliettino (further) processes Gilbert's non-compliance grievance, that Kestell will defend LL 707 against any duty of fair representation charges that might be filed by other adversely impacted employees, without legal fee charge.

Vice President Nixon at hearing asserted this letter was his idea. As noted, neither Nilson or Gogliettino were called as witnesses to corroborate Nixon. In contrast, Nixon had earlier testified there was no friction between him and Gilbert; and Nixon assertion of president Nilson discussion of some unhappiness with dlr Gilbert's taking certain actions, while Nilson was working, appears to have been a year earlier. In any event, Kestell agreed to do so, assuring *president Nilson* both that Kestell had made his legal judgment on the merits of Gilbert's non-compliance grievance, and *not on any political considerations.*

As noted, this is *the first documentary evidence* of any LL 707 (or DL 91 Tracy-Romegialli) expressed concern in regard to a potential charge from an adversely impacted employee, and it arose in clear context of an attorney's response to a LL 707 question of his advice

playing to internal union politics expediencies, immediately prior to 4th step grievance level that involved DL 91 dlr Romegialli.

Dlr Romegialli thereafter presented step 4 of the grievance on *11* October 1983. The grievance again reflects *formally* only a Company general denial of the grievance. In that regard, while Romegialli recalled speaking to Gilbert only once in the Fall (about the safety representative position), Romegialli testified also that he had kept Alta Moran, (then) LL 707 financial secretary, informed. Romegialli has testified that he probably did so on the day after 4th step grievance denial, thus 12 October 1983, because Alta Moran was very concerned, and wanted to make sure that LL 707 pushed the grievance all the way. In rebuttal Alta Moran had no recollection of such a conversation with Romegialli, and disavowed a specially pursued interest in it. Moran's disavowal is not without some question, as the record reveals that Alta Moran has financed much of Gilbert's litigation, through, as yet, unrepaid loans.

Asserted as being in response to step 3 (23 September 1983) development of Company position, Directing LR Tracy sent a letter dated *11 October* 1983 to P&W's Industrial Relations office. Notably however, UTC vice president J. T. Bouchard of that office asserts in response letter that Tracy's letter was actually mailed on *20 October* 1983 and received by Bouchard on *21* October 1983. (Tracy's letter would thus have been mailed *after* completion of the 4th step of grievance procedure.) Tracy's letter provides:

> I understand that the Company has taken the position in the grievance procedure that Wayne Gilbert may not be returned to work until 1986 because he is purportedly on leave of absence status for four years. As you well know, the Company denied Mr. Gilbert leave of absence status when it was originally

requested. At that time the Company informed the Union that the leave of absence requested for Mr. Gilbert—and Mr. Gilbert only—would not be granted. As you also well know, on June 2, 1983, Local 707, on behalf of Mr. Gilbert sent a letter to Donald Telesca making clear that Gilbert sought to return to work in the shop. This letter was long before the arbitrator's decision in Mr. Gilbert's discharge. *In addition, as you well know, Mr. Gilbert has not been a Labor Representative since July 1, 1983 and had resigned from his Labor Representative position by letter to me dated June 2, 1983.* Now I have been advised by the Local 707 Shop Committee that the Company's position at the third step grievance meeting is that for Mr. Gilbert to be returned to work at any point prior to 1986, I need to submit a request to the Company.

While the *company's most recent position, as reported at the third step,* seems ludicrous to me, let it not be said that I was in some way responsible for not returning Mr. Gilbert to work.

Accordingly, I hereby request that as in Mr. Pete Tinella's case, Mr. Gilbert not be continued on leave of absence status with the Company, effective immediately. (Underscoring supplied).

This is the first documentary evidence (even) arguably of a DL 91 expression of a resignation of Gilbert occurring by letter 2 (sic) June 1983, either internally, to Employer, or to anyone; and even then it recites the fact of Gilbert's continuance as a dlr beyond that date, until 1 July 1983 (DL 91 layoff date).

Bouchard replied to Tracy by letter dated 26 October 1983, which was (also) after the 4th step on LL 707's (noncompliance) grievance was held. It provides:

This matter has been made the subject of several grievances and of charges filed by Lodge 707's attor-

ney with the NLRB. Indeed, that attorney has advised our attorney that he is in the process of preparing a complaint in the United States District Court to enforce Gilbert's claims that he should be returned to work in preference to more senior employees now laid off.

At your request, I agreed to terminate, prematurely, Mr. Tinella's leave of absence to serve as a Labor Representative, as an exception to the provisions of the labor agreement, and thus to clear the way for Mr. Tinella to return to work in the shop prior to the termination of his leave of absence. As you know, however, there were no employees more senior to Mr. Tinella who, at that time, were in a lay-off status. Mr. Gilbert's claim is that he should be returned to work in the shop even though he has less seniority than other employees who currently are laid off. *The real issue, therefore, is whether the company should lay off another more senior employee to make room for Gilbert.*

As you state in your letter, it is "ludicrous" to suggest that the issue cannot be resolved unless a request is made by you that Gilbert "not be continued on leave of absence." *The impediments to Gilbert's return to work are the contractual and legal rights of other employees more senior than Gilbert.* (Underscoring supplied.)

The letter does not claim, nor does any union witness, that this was the stated position of the Company at earlier grievance steps. No Company witness testified thereto. On the same day Employer filed charge in Case No. 39-CB-493 against LL 707, charging that union with a violation of Section 8(b)(1)(A) and (2) as follows:

Since on or about September 7, 1983, the Labor Organization named above, which is the contractual representative of maintenance and production work-

> ers at the Employer's North Haven, Conn., plant has insisted and is insisting that Wayne Gilbert be given preference by the Employer in employment over more senior employees because of his membership in, or position with such Labor Organization, and has threatened to bring legal action against the Employer to compel the Employer to give such preference to Wayne Gilbert.

By letter dated 16 December 1983, the above charge in Case No. 39-CB-493 was dismissed by the Board's officer in charge.

Analysis of DL 91 view of Gilbert letter of resignation

Gilbert's frustrated claim with Employer did not arise from an inability to be employed by P&W while in a laid-off DL 91 employee (dlr) status. Tinella worked for P&W while occupying that same status. Gilbert's P&W employment problems arose initially by virtue of an *improper* discharge as determined by an arbitrator. That discharge was set aside by the arbitrator. However, Gilbert's P&W employment problems continued thereafter by virtue of Employer's refusing to recognize LL 707's timely designation of Gilbert as safety representative because, at the time *it* acceded to the arbitrator's Award. To do so would effectively cause another (then) employed employee, with greater seniority, to be laid off. That however is what was provided for *by the contract* between Employer and the Union, that allowed for super seniority to be granted to an employee that LL 707 should (exclusively) designate to serve as its safety representative. Presumably, that is what would have occurred, if Gilbert had been an active employee at the time of LL 707's earlier and timely designation of Gilbert as its 3rd shift safety representative on 2 June 1983, prior to P&W layoff of 3 June 1983.

It will be recalled that it was in October 1983 that Poulin received his new assignment as GVP in charge of

International's North East Region that included, *inter alia*, DL 91 and its affiliated LLs. It was in November (if not October) 1983, that glr Almeida received an initial assignment (*inter alia*) to DL 91 apparently to aid in the correction of certain administrative problems within that organization, at the request of DL 91 Directing LR Tracy. It is clear that the December 1983 leaflet distribution reviewed by ALJ Harmatz, in pertinent part addressed (at least) perceived failings of president Nilson and Shop Chairman Gogliettino of nature likely related to their involvement in an inquiry of attorney Kestell over his continued pursuit of the (noncompliance) grievance of LL 707, at time of DL 91 dlr involvement. The related facts as found by ALJ Harmatz, 276 NLRB 985 at 987, I find are pertinent again here:

> The leaflet then turned to a low-keyed assault on President Nilson and Local Lodge 707 Shop Chairman Gogliettino accusing them of "irresponsible leadership," while raising the possibility that they are in "league with the company," accusingly stating they had "split our ranks in front of the company."

In contrast with Gilbert perception (e.g. with his part in drafting the leaflet assertions), however, the parties entered written stipulation in hearing before ALJ Laurence that essentially acknowledges the fact that LL 707 prior to the leaflet distribution (through attorney Kestell's firm) was actively pursuing a Court enforcement of Gilbert's grievance award. Thus see e.g. Resp. Ex. 2, p. 3, which pertinently recites:

> 16. On November 9, 1983, Local 707 filed a petition in Civil Action No. H83-940 in the United States District Court for the District of Connecticut seeking, *inter alia*, to compel the Employer to submit to arbitration the grievances it filed over the Employer's refusal to reinstate Gilbert, or in the alternative, for an order confirming Arbitrator Porter's award. In pursuing its petition in District Court, it is Local

707's position that compliance with Arbitrator Porter's decision requires that Gilbert be reinstated to active employment as third shift safety representative.

As found by ALJ Harmatiz, it was a full month later, 11 December 1983, that the "Committee of the Rank and File" (attended by seven unnamed members) met, and decided to publish the leaflet that had been initially drafted by Gilbert (and the Morans) in early December 1983, and which served as the cornerstone for the events and circumstances initially addressed by ALJ Harmatz. Judge Harmatz relatedly found that it was on 12 December 1983 that Almeida had learned through the "grape vine" of the undistributed leaflet; first sought out the Morans, and thereafter engaged in the coercive conduct thereafter found unlawful. Those findings (and similar pertinent findings of Judge Lawrence) have been earlier highlighted, and need not be repeated here beyond general observation that the span of addressment of both ALJ Harmatz and Lawrence decisions covers subsequent union misconduct against Gilbert extending essentially from December 1983 through November 1984. It is in March 1985 that Gilbert is not recalled, on the asserted basis he had resigned. The heretofore considered conditional resignation is no longer treated as conditional, even though Gilbert still remained unemployed by P&W as LL 707's designated third shift safety representative. The combined unfair labor practice finding of ALJ Harmatz and Lawrence reflect International, DL 91 and LL 707 had all developed marked hostility to Gilbert in the interim period. Tracy's additional assertion that Gilbert never claimed he didn't resign until after the recall of Tinella on 11 March 1985 is hardly convincing in the light of the above background. (However, in making this finding I specifically do not rely on Respondent's Ex. 20, a letter dated 21 December 1983, with copy to Tracy. This exhibit was not offered, nor received in evidence.)

There are other discrepancies in DL 91's asserted reasons for not calling Gilbert.

Tracy has also testified that Gilbert never told Tracy that Gilbert did not want the 3rd shift safety representative job, nor ask that the arbitration be abandoned. But neither did Tracy, DL 91 or LL 707 ever rejected Gilbert's resignation as submitted, and accepted in conditioned form for over 21 months. Moreover Gilbert's position therein throughout this period was not at all inconsistent. At the time, Gilbert was unemployed. It is fair inference that he needed and wanted a job from either source of employment to which he perceived he could lay lawful simultaneous claim. Gilbert never received a copy of Tracy's letter to P&W on the noncompliance grievance. Moreover, neither Tracy or DL 91 ever sought clarification of Gilbert as to any contended incompatibility in LL 707's continuing to press to secure Gilbert's reinstatement as LL 707's safety representative, and Gilbert's unexpired term of dlr status, that continued for so long as the condition upon which Gilbert's resignation woud become effective, remained unmet.

Subsequent early February 1984 correspondence of Poulin to Gilbert (I find) offered nothing to dissuade Gilbert from holding that view. If anything, Poulin's letter would (at best) only serve to encourage Gilbert in those very views by virtue of Poulin's assurance of his office continuing oversight of Gilbert's rights as both a dlr representative and LL 707 member.

Thus by letter dated 1 February 1984 (see G.C. Ex. 17) Poulin, after reciting, *inter alia*, DL 91's layoff of the 3 dlrs, informed Gilbert in pertinent part:

> *I am unaware of any activities which may impact on your lay-off status.* With reference to the questions you raise concerning the actions or activities involving District 91, in regard to your layoff status, I would recommend that you go to the source of your lay-off, District 91, and discuss the situation with them.

> You can be sure that this office stands ready to insure that the rights of all of our members and representatives are handled in a fair and impartial manner, consistent with the Laws of our Organization. (underscoring supplied)

The fact of the matter however is that the Union (International, DL 91 and LL 707) then, and thereafter were engaging in conduct heretofore determined to have restrained Gilbert's rights as LL 707 member.) Gilbert obtained employment thereafter in May 1984, by the National Association of Government Employees (NAGE), International Brotherhood of Police Officers. Gilbert currently serves as NAGE national representative, with assigned responsibility for the State of Connecticut. Gilbert occupied that position on 11 March 1985 when Tinella (who was himself employed at P&W) was recalled to DL 91 employment as a dlr, under the following circumstances.

Called as a witness by General Counsel, Tinella recalled that he returned to work in April 1985; and that he had received instructions to do so the month before. The parties have stipulated more definitively that Tinella returned to DL 91 payroll on 29 April 1985. Material DL 91 meetings were held on 11 March and 8 April 1985, respectively. Weight of evidence establishes beyond the questioning that the recall of Tinella was first recommended to, and approved by DL 91 Delegate Body on 11 March 1985.

Tinella as (regular, or alternate) delegate and Forrester as delegate attended the 11 March 1985 DL meeting. Both Tinella and Forrester have affirmed that DL 91 president Ed Burton presided; that Directing LR Tracy was not present; and that Drosehn, then (acting) assistant Directing LR was present. (Webber was also not present.) Tinella testified that at the meeting Drosehn said: another dlr was going to be put on; and that he

would like to put Tinella on staff. Tinella testified the DL 91 (Delegate) Body thereafter gave its ok. Forrester confirmed that Drosehn recommended that Tinella be put back on staff, and a vote of approval later occurred.

Tinella also recalled that during the meeting Forrester questioned Drosehn why Tinella was being put back as dlr, instead of Gilbert; and that Drosehn replied that Gilbert had resigned. According to Tinella, there was no further discussion. Drosehn did not testify. Forrester confirmed that he questioned why Tinella was being brought back. Forrester explained that at the time he knew that Gilbert had more DL 91 seniority than Tinella because he knew Gilbert had started as dlr on 1 August 1982, and Tinella 3 weeks later in order to vest a pension. It is however, Forrester's recollection that Almeida had responded to Forrester's question; and that Almeida had then said that he had heard that Mr. Gilbert was a no-good bastard, who was out to ruin our organization; and that Gilbert was no longer a member of our organization. Forrester's recollection of the derogatory remark by Almeida directed towards Gilbert in this meeting is not corroborated by any other witnesses; and it is not credited by me as made in this meeting for the reasons that follow.

Forrester offered in related explanation of the reason he had asked the question at this time, that he did so because he knew of Almeida's personal feelings toward Gilbert, and he more or less asked the question to "frank" (sic goad) Almeida a little bit. Forrester also had no recollection of anyone saying that Gilbert resigned in this meeting. However, Gilbert's letter of 5 April 1985 to the Union, and weight of union officials' testimony on this matter otherwise have wholly convinced me that there was mention of Gilbert resignation in that meeting of 11 March 1985, whether by Drosehn, or Almeida.

With regard to the purported derogatory remark of Almeida, Forrester has acknowledged otherwise that

(since) after 1983 he had had occasion to bring up Gilbert's name in (other) DL meetings. The record establishes that Forrester had also had no recollection of earlier personally recommending that the dlr layoff in 1983 be accomplished on basis of the number of votes received by the dlrs in the last election, though upon his own review of supplied minutes of the meeting of 9 May 1983, Forrester then acknowledged the minutes indicated that he had done so. The form of Forrester's recollection itself, in attributing to Almeida the lead-in remark as to what he had heard of Gilbert at this meeting, occurring about a year after the Gilbert-Almeida confrontational events of 1983-1984, as heretofore determined by ALJs Harmatz and Lawrence, independently raises question of an implausibility that the utterance (what he heard) was made by Almeida, in March-April 1985, a year later, after so many personal dealings with Gilbert.

General Counsel would have observed that Almeida has not (explicitly) denied the statement that Forrester has attributed to him, and on that account has urged in brief the statement is uncontradicted by Almeida, and should be credited. Be the absence of Almeida *explicit* denial as it may, Forrester accusation has not gone wholly undenied by Respondent. Thus Obier, a DL 91 delegate since 1983, has testified that he heard Forrester's testimony as to Almeida's derogatory references; that he was present at the meeting, which he identified as in March; and that Almeida did not make those statements. For all of the above reasons I do not credit Forrester's recollection of the Almeida (explicit) derogatory remark above about Gilbert at *this* meeting.

Obier has otherwise corroborated Forrester and Tinella that in this meeting Drosehn gave the Directing LR report, that Drosehn stated a dlr position was going to be filled; and that they were bringing back Tinella. Obier recalled that all three names of Fleeting, Gilbert and Tinella were brought up; and, according to Obier, the

question *was* referred to Almeida. Obier recalled that Almeida said that Fleeting had transferred to DL 170, and he was no longer a part of DL 91. Obier corroborates that Forrester questioned why Gilbert was not brought back as dlr. Obier's recollection is that *Almeida said Gilbert resigned*; and that was pretty much it. Obier however, reaffirmed that Almeida was not derogatory towards Gilbert in this meeting.

Almeida has testitfied that *Directing LR Tracy made the recommendation to bring back Tinella, through his assistant, Drosehn.* Almeida explains that at this time Tracy was working (only) a couple of hours a day, and he was at home ill. According to Almeida, Tracy told Drosehn, who at the time was regularly working in the office, to bring Tinella back. Almeida otherwise confirmed the other delegates' recollections that Droshen recommended to DL 91's Delegate Body that Tinella, by name, be returned to work; and that the DL Delegate Body concurred. I have no doubt on this record that it was Tracy who made the determination to recommend to DL 91 Delegate Body that they bring back Tinella, and not bring back Gilbert, because he resigned. There is also however, no question that Almeida discussed both the matter of Tinella's return, and the matter of Gilbert's (purported) resignation with Tracy.

As to the 11 March meeting (I find), Almeida has confirmed generally that there was quite a bit of discussion about Fleeting, Gilbert and Tinella. Almeida testified that it was brought out that Fleeting had made a decision to transfer his membership (along with his LL) into Dl 170 (New Haven); that the transfer had severed Fleeting's connection with DL 91; and that Fleeting had thus left the jurisdiction of DL 91, which made Fleeting ineligible for recall/rehire. Almeida also confirmed that Forrester raised a question why Gilbert wasn't being brought back. Although Almeida recalled only Drosehn stating that Gilbert had resigned, Almeida confirmed the

others that the response made to the question was that Gilbert had resigned.

Almeida initially asserted that to his knowledge there wasn't a discussion in the meeting why Tinella was proposed by Drosehn (for recall). Almeida thereafter recalled that something was said similar to that Tinella was the last one left, though he didn't remember that exactly. The record establishes that in this meeting, an (additional) dlr vacancy was anticipated. The additional vacancy related to a scheduled election for Directing LR office, in which Tracy was not to run, but (apparently) other dlrs were. In any event, an election to fill the prospective dlr position to be vacated was even then being scheduled to be held on 12 June 1985, after the newly to-be-elected Directing LR (Webber) would take office on 1 May 1985. It is more likely the recalled reference to Tinella as the last one left came in that context, *viz.* that there would have to be a dlr election. (Gilbert did not seek to run in the election. William Rudis won.)

Almeida testified relatedly, that prior to the above DL meeting, in February 1985, DL 91 needed an additional staff person. Staff recommendation rests with the Directing LR. However, *before* presenting a recommendation to the DL, *the Directing LR requests approval of International.* If the International doesn't approve, the DL can't increase the staff, unless it wants (is prepared) to pay the full salary. Tinella's name had been already submitted along with DL 91 request that International reinstate a DL 91 dlr position.

Almeida also testified that he assumed there wasn't an election (for Tinella position) because Tinella had some unexpired term, and DL 91 wanted to hire Tinella, based on his qualifications. Almeida has confirmed explicitly that Tinella was not appointed; and that Tinella was rehired or recalled "to fill unexpired term." Gilbert with similar unexpired term, and more seniority than Tinella, was not, assertedly because he resigned.

Although slow in development, Almeida in the end has testified significantly and rather revealingly in regards to the matter of Gilbert resignation. Almeida confirmed Tracy wrote a letter to Almeida, dated 26 February 1985, in which Tracy reported to Almeida the DL 91 seniority dates of Gilbert as being 1 August 1982, and of Tinella as being 23 August 1982. Tracy also reported P&W seniority dates of Tinella 21 August 1972, and Gilbert 8 January 1973; and, *inter alia*, with Tracy ending statement, "Hoping this assists you in your quest, . . ." Almeida acknowledged that in February 1985, Almeida had made an inquiry of Tracy as to the seniority standing of Gilbert and Tinella. Almeida asserts that Tracy wanted to bring them back in accordance with (ambiguous) seniority, if he was able to; *and*, that the question was whether Gilbert could be a candidate for recall, or rehire. Tracy testified specifically that he didn't know why Almeida wanted to know about Gilbert's seniority; and that it was Tracy's opinion that Tinella was the only eligible person, period. I am however convinced that Almeida was well aware of Tracy's position in recall, and generally amenable to Tracy's wishes to recall Tinella, and not Gilbert, if it could be done. At the time Almeida was engaged in an investigation of the facts, since a request and report to International had to be made.

Tracy affirmed sending the 26 February 1985 letter to Almeida; and that the underlying circumstances were that DL 91 was recalling a dlr. Tracy has testified (in manner most revealing of his intention) that the only one being considered was Tinella because Gilbert had resigned; that it was his opinion that Tinella was the only eligible person, period; and that seniority had nothing to do with it. The letter of 26 February 1985 *itself however makes no reference to Gilbert having resigned his dlr status.* I am convinced that resignation consideration far more likely arose later; and at the earliest, when Almeida reviewed the seniority facts supplied by Tracy, and saw

that Gilbert had more DL 91 staff seniority. Thus, the 26 February 1985 letter addresses paramountly the seniority dates of *both* Gilbert and Tinella.

Tracy has confirmed at hearing, that he wrote this letter to Almeida, because Almeida had (specifically) requested the seniority date of Gilbert and Tinella. The letter covers both staff and P&W seniority. It will be recalled that DL 91 staff seniority was the only factor ultilized in the 30 June 1983 DL 91 layoff. That factor, apart from resignation issue, would import first recall of Gilbert. Tracy relatedly could not readily explain why Almeida had wanted to know about Gilbert's seniority, if Gilbert had years earlier resigned; nor did he adequately explain why Gilbert's resignation is not mentioned in the letter. (Neither Poulin or International had been informed of a Gilbert resignation, as is customarily done, discussed *infra.*) Tracy asserts that he did not discuss with Almeida why Almeida wanted the seniority information; but thereafter asserted that he believed it was to submit it to the Union's attorney, and that it had to do with (unspecified) Labor Board charges. The same is shown much more convincingly related as a matter of preliminary investigation by Almeida prepatory to his submission to International, in regard to additional staffing need, discussed above.

At hearing, in general, I did not find Tracy's assertions in regard to this letter as either candid, or persuasive. Upon review I find the same even the less so, especially with consideration of Tracy's still further and ending assertions that he viewed all three dlrs as with same staff seniority date (contrary to clear import of the letter); and it got down to a matter of (tiebreaking) tenure with P&W in which Tinella prevailed. Tracy had wanted Gilbert out as a dlr, and he didn't want him back. I credit Almeida that Directing LR Tracy made the recommendation to bring back Tinella, through his (acting)

assistant Drosehn. But this does not mean Almeida did not agree, and readily go along with that view.

Poulin testified that he was asked to recommend to International's Council a reinstatement of a dlr position in DL 91, and he said he would. Poulin explained that when he makes such a request it is for a position, not a person as such, though with a request made of him to do so, a name is submitted, because the vice president has to make sure the individual is eligible. The procedure is that the vice president tells the IP, and recommends to the International's council. In this instance both IP and International's council went along.

Poulin has testified that he recalled no discussion about Gilbert, but also that he was sure that at the time of Tinella's recall he had discussions with Almeida concerning Gilbert's prospects for a return. Poulin acknowledged it is usual to confirm acceptance of resignation; that he was not aware of any International (formal) notice of a Gilbert resignation prior to Tinella's recall, but adds, that is sometimes the case. Poulin has testified that he didn't associate talk of Gilbert resignation with Tinella's recall, but that he didn't really know the timing of his own awareness of Gilbert's resignation. I'm sure, on this record, his awareness of Gilbert's resignation as an issue came later, but not much later.

By letter dated 22 March 1985, Gilbert wrote Tracy reciting Gilbert awareness that DL 91 had decided not to recall Gilbert; and Gilbert therein *formally requested* a reinstatement to dlr position. In this letter Gilbert also stated his understanding there were two dlr positions open. Gilbert laid claim to one as the senior (laid-off dlr) eligible for reinstatement; and Gilbert suggested the scheduled 12 June 1985 election is obviated. Gilbert requested a DL 91 review of prior correspondence, specifically of Gilbert's 3 June 1983 (conditional) resignation letter to Tracy, and Nixon (appointive) letter of 2

June 1983 (stating conditioned acceptance). Gilbert also advanced intended reliance of DL 91 prior position on layoff of Gilbert as presented to ALJ Lawrence in 15 November 1984 hearing. Gilbert also advised Tracy that Gilbert had consulted his attorney, and he would await DL 91's review of the facts at the next scheduled DL 91 meeting of 8 April 1985.

It is also notable that Gilbert *did not address the subject of his purported resignation in the above letter.* However, by letter dated 5 April 1985, Gilbert wrote to DL 91 Recording Secretary, with copy shown to be delivered to all recording secretaries of all (then) affiliated locals of DL 91 which recited that Gilbert understood that at the last DL meeting (11 March 1985) it was moved and passed to recall Tinella, and to have an election for an (additional) vacant dlr position; and that it was there stated Gilbert was not recalled *because he had resigned.* Gilbert flatly denied he had resigned, enclosing the (unspecified, but of record identified) earlier letters he had referred to. Gilbert therein otherwise (essentially) renewed his claim of holding a superior position for recall, because more senior. *Notably Gilbert advised the addressees that his earnings from his current job were less than half what he earned as dlr, and a lot less than he earned in the (P&W) shop.*

By letter dated 9 April 1985, thus after the 8 April 1985 DL 91 meeting, Tracy wrote Gilbert as follows:

> In response to your letter of March 22, 1985. Please be advised that our records indicate that you resigned your position as a Labor Representative in order to accept the position of Health and Safety Representative of Local Lodge 707. Your resignation was effective June 2, 1983.
>
> It has further been reported to this office that your membership has been lapsed effective June 30, 1984.

> You, therefore, are not eligible to hold office under the applicable provisions of our Constitution and/or By-Laws.

In regard to this letter, Tracy has testified that Almeida authored it, and Tracy approved it. Tracy explained that at this time Tracy's health was very bad, and Almeida was doing a lot, or more of his work. Though Tracy acknowledged it would not be unusual to ask Almeida for advice, he also testified that he wouldn't think he needed advice on this one, though Tracy clarified, he did believe that *Almeida included the matter on eligibility (membership lapse)*. As we shall see from what follows, Almeida *at least* by this time had made considerable inquiry on the resignation issue. I find, in his evaluation, he effectively hedged on the Union's recognized questionable resignation call, with addition of the membership eligibility issue (that LL 707 continued to pursue) and which is (now) subject of Board (and Circuit Court of Appeals) rejection through enforced unfair labor practice finding of ALJ Lawrence.

Almeida's testimony in certain other respects moreover, was simply not candid. E.g. in what must be regarded as a demonstrably unlikely assertion, particularly given the prior ALJ findings of Almeida hostility to Gilbert, Almeida has related that Gilbert's name stood out no greater than Fleeting and Tinella at the time. I cannot accept that assertion. Equally questionable is Almeida assertion that he had no idea of the basis for (Drosehn) suggesting Gilbert had resigned. (I cannot believe that came as a complete surprise to Almeida.) To be sure, Almeida has testified of rather appreciable discussions on that very subject. While there likely was considerable discussion after Gilbert's letter(s) of 22 March and/or 5 April 1985, it is just as apparent there was discussion about Tracy's position on Gilbert's resignation before that meeting.

Almeida has otherwise testified severally: (a) through many meetings DL 91 had taken the position that Gilbert had resigned as dlr; (b) that he (Almeida) had seen written communications about Gilbert's resignation, some by Gilbert, some by Nixon, and one by Tracy, (c) and though some contained contingencies, that Tracy said that Gilbert said he resigned, with Drosehn present; (d) that dlr Romegialli, shop chairman Gogliettino and (then) president Nixon had told him that Gilbert had resigned, (e) that various officers of LL 707 told Almeida that Gilbert had made inquiries as to the status of his case to implement the arbitrator's award, to return Gilbert to his (P&W) job, and as safety representative, and to make him whole; and (f) that that was the Union's position always, until they reached settlement (in February 1986), namely to seek full backpay for Gilbert, back to the time P&W terminated Gilbert. However, in revealing, if reluctant testimony, Almeida testified that he did not recall talking to Tracy about Gilbert wanting to be recalled; that there might have been a Gilbert letter inquiring about right to be recalled. When asked if he saw a Gilbert letter to Tracy in regard to wanting to be recalled, Almeida testified he would have to see the letter; and assuming there was such a letter the only reason he knew that Gilbert wasn't appointed (sic recalled) by Tracy was that Gilbert was considered as resigned. (Seemingly Almeida latter testified as to the document he was earlier unsure of seeing, after review of the file, that he did see it.)

analysis

What on its face appears to carry some measure of force for Respondent,, on closer analysis wholly fails to persuade. Firstly, it is of no moment on the issue of unlawful withholding of Gilbert recall to open DL 91 position in March 1985 that LL 707 was vigorously pursuing Gilbert's return to P&W employment in position of safety representative, and that the Company (eventually) entered settlement that made Gilbert (assertedly)

whole *in regard to P&W* employees wages for the same period. That grievance-arbitration issue remained undecided at the critical time the dlr jobs opened (March 1985). Not only is the proverbial bird-in-the-hand worth two-in-the-bush fundamentally sound here as fair option for Gilbert consideration, but even more so, since the DL 91 dlr job at least *paid more* than Gilbert's present NAGE job, and seemingly more than P&W employment.

Secondly, painstaking analysis of the witnesses' knowledge and base of knowledge on prior resignation statements has caused me to conclude for reasons reflected above that need not be repeated here, that the above personages' knowledge, except for Tracy, did not fairly exceed the import of Gilbert's letter of *conditional* resignation to Tracy, and/or Nixon's letter indicative of a conditioned acceptance of that resignation. Close analysis of Tracy's subsequent letter to P&W, while reciting Gilbert resignation submission effective 2 (sic) June 1983, itself reflected a suspension of effectuation in that Gilbert had continued in employ of DL 91 as dlr through 30 June 1983 when he was laid off.

It simply, in my view, comes too late for Tracy to seek to resurrect and hold Gilbert to an oral (assuming unqualified) resignation in March 1985 that Tracy both immediately rejected on 2 June 1983 and in the interim did not previously seek to hold Gilbert to. When, in March 1985, with the (noncompliance) grievance still unresolved, Gilbert made flat claim to recall to open dlr position(s) neither Tracy or DL 91 made even an effort to confront Gilbert and present choice of dlr position recall, or continued LL 707 (noncompliance) grievance pursuit, only upon surrender of the condition of his prior resignation. Finally, neither Tracy or DL 91 afforded Gilbert that choice even when they not only recalled a less senior dlr (Tinella), but opened another dlr vacancy to election. I have no doubt Almeida was well aware of the import of Gilbert's letters of 22 March and 5 April

1985. Almeida has acknowledged that the Gilbert-Tracy resignation letter and Nixon-P&W letter contained contingencies.

As a final consideration in that respect, *viz.*, in regard to Almeida's reliance on Tracy and Drosehn declaration that Gilbert had orally resigned, as noted Drosehn did not testify, and thus did not corroborate the assertion. Assistant Directing LR Webber has testified she was nearby and had heard Gilbert say he resign. Webber was a generally credible witness. However I do not believe that Webber could have heard more than what Gilbert and Tracy mutually report they said; and both have Tracy rejecting any offered oral resignation. Moreover, Webber acknowledged she *did not know* of the contingent letters Gilbert subsequently wrote as a result of Tracy direction. Webber's posture as recently elected Directing LR (on 1 May 1985) places DL 91 in no better posture as to the 12 June 1985 election. On taking office she knew, or should have known, of the base of Gilbert's claim. The fact that Gilbert did not (alternatively) elect to seek to take part in that June 1985 election does not diminish his claim of superior right to recall to one of the open positions, without having to run to an elective office, in which he had substantial unexpired term, just like Tinella.

Finally, Almeida has otherwise testified that he had no personal knowledge of Gilbert's resignation, other than what he has read (and been told); and perhaps most revealingly in regard to his position vis-a-vis Tracy intention in regard to Gilbert, that he, Almeida, didn't know if Gilbert had resigned or not. On the basis of all of the above it is clear to me, and I now conclude and find that Gilbert had only conditionally resigned; that the underlying precondition that would have made his resignation effective had not occurred as of the time of his first opportunity to be recalled as a dlr on and after 11 March 1985. Since Gilbert's conditional resignation was not in

effect on and after 11 March 1985; and since he had more seniority than Tinella who was recalled, the asserted reason for not recalling him on the basis of resignation is shown to be pretext.

Moreover, Tracy's shotgun reasoning approach to justify the nonrecall of Gilbert wholly failed of conviction, which but enforce the warrant to look elsewhere for the reason. One finds it readily in the strained Gilbert-Tracy relationship, exacerbated by Gilbert's extensive engagement in protected conduct: of expressing criticism of union officials; in filing charges and testifying in support of those charges that he brought against not only DL 91 but International, and its affiliated LL 707; and DL 91 hostility as found heretofore in ALJ Lawrence prior proceeding.

For all of the above reasons it is concluded and found that DL 91, since on and after 11 March 1985, has failed and refused to recall Wayne A. Gilbert to his DL 91 dlr position (with its tenure throgh 30 April 1986) in violation of Section 8(a)(4), (3) and (1) of the Act. Though this finding need not rest on the circumstance, the fact is that DL 91 additionally relied on a claim of ineligibility because of Gilbert's asserted nonmembership in LL 707, a position heretofore determined unlawful. Although LL 707 nonmembership, in general is a matter for ALJ Lawrence decision compliance by DL 91 and LL 707, it seems to me, DL 91's improper reliance on the same is fully addressable herein as a previously determined unfair labor practice fact, bearing on an issue in this proceeding, thus an unlawful base further supportive of the result presently reached.

C. *The complaint alleges that since on or about 1 February 1986, Respondent DL 91, and since on or about 16 February, Respondent LL 707, have violated Section 8(b)(1)(A) of the Act, by failing and refusing to allow Gilbert to be nominated as a candidate for election to the position of DL 91 dlr.*

There is no dispute that a member applicant for election to dlr must meet International's Constitutional and DL 91's (IP approved) Bylaw qualification requirements.

1. Constitutional qualification requirements

That business representatives are the same as dlrs is not contested. The Constitutional qualifications for dlr are found in Article XI, Section 4, which provides, in part (G.C. Ex. 4), pg. 35), as follows:

> Sec. 4 Members shall not be permitted to serve as business representatives unless they have been
>
> 29 in continuous good standing for at least 2 years and
>
> 30 must be working at the trade one year immediately
>
> 31 prior to their nomination and free from delin-
>
> 32 quencies of any nature to a L.L., D.L. or the G.L. All
>
> 33 business representatives must qualify under Sec. 5,
>
> 34 Art I. . . .

The last referenced Article I, Sec. 5 (*id.* pg. 2) qualifications are not of material consideration to the issues presented herein, and will not be further considered.

There are however other constitutional provisions of testimonial and documentary moment. They have to do

with Constitutional definition/exception and/or qualification requirements of "working at the trade one year immediately prior to the nomination." Poulin acknowledged the same do not appear in the above Article XI, Section 4, dlr qualification provision, but asserts they are found elsewhere in the Constitution. While Poulin has testified that only the IP interprets the Constitution, Poulin releatedly testified that from his experience in working with the IP on such issues, the "working at the trade" definition is spelled out in Article II (Delegates to Convention), Section 4.

The aforesaid definition/exception as contained in Article II (G.L. Conventions), Sec. 4 (Qualification of Delegates), in pertinent part (G.C. Ex. 4, pg. 7), provides:

* * *

> Sec. 4.
>
> The qualification "working at the trade" shall not apply to members who are salaried full-time employees of any L.L., D.L. or G.L., a council, conference, or the A.F.L.-C.I.O., nor shall it apply to members who experienced a layoff during the 6-month period prior thereto, or to members who have been unable to obtain employment at the trade because of a strike, lockout, discrimination or temporary physical disability, or to members who are retired on pension and paying full dues.

* * *

Poulin testified releatedly that if the member is laid off for less than 6 months the member is not subject to the "working at trade" requirement, but if laid off for more than 6 months, the member has not been "working at the trade." Here the question is whether Gilbert was laid off for more than 6 months; and, if so, what is the effect of that circumstance in light of other facts of record.

Article B (LL Officers), Sec. 3 (Qualifications for Office), in pertinent part (*id.*, pg. 83), provides:

* * *

Sec. 4.

Except at the first regular election of officers, or as further provided hereunder, all candidates for elective office must be members of the L.L. for at least one year at the time of nomination, and free from delinquency of any nature to a L.L., D.L., or the G.L., and shall be working at the trade as defined in Sec. 4, Art. II, for 6 months prior thereto in order to qualify for nomination and election.

* * *

Poulin testified that this (LL officer qualification) has been a qualification for dlr as long as he has been an officer.

2. DL 91 Bylaw qualification requirements

DL 91 Bylaws' requirements (which may not conflict with Constitution and must be approved by IP) are found in DL Bylaws Article X. In certain respects, dlr qualifications are interrelated to that for Directing LR contaianed in the same Article X, in that both Directing LR and dlr positions carry a (normal) February (election year) nomination requirement, although the dlr position has a qualification requirement of two (2) years "in continuous good standing" prior to nomination, while the Directing LR position carries a three (3) years requirement in that regard. Otherwise, for dlr, there is requirement in DL 91 Bylaw Article X, Section 3, insofar as pertinent (G.C. Ex. 5, pg. 10), that the member be as follows:

* * *

Sec. 3.

2. A member actively employed in one (1) of the shops coming under the jurisdiction of this District

or employed by the District or one (1) of the Local Lodges affiliated with this District for a period of at least one (1) year prior to nomination. Members on strike or victimized shall be exempt from the provision of this 1-year clause.

3. The Labor Representatives will be elected in the same manner and under the same provisions in these bylaws as the Directing Labor Representative with the exception hereinabove mentioned.

The Directing LR positon qualification (as thus referenced) in DL 91 Bylaws (for dlr) has requirements relating to Directing LR (which in turn refer to those in Constitution) providing, insofar as pertinent (G.C. Ex 5, pg. 9), DL 91 Bylaws Article X, that the member be as follows:

* * *

Section 1.

2. A member actively employed in one (1) of the shops coming under the jurisdiction of this District or employed by the District or one (1) of the Local Lodges affiliated with this District for a period of at least one (1) year prior to nomination. Members on strike or victimized shall be exempt from the provision of this 1-year clause.

3. He shall also meet all requirements as set forth for Labor Representatives in the IAM Constitution.

As noted, Poulin testified that only the IP can interpret the International's Constitution and DL 91's Bylaws, e.g. specifically, as to the exception generated for those "victimized." Poulin has otherwise testified that that term has been usually associated with an employer problem, *viz.*, an employee denied a job, or fired by an Employer. When asked if it would similarly apply to circumstances arising (as in Gilbert's case) of a dlr employee of DL 91 (e.g. denied recall) Poulin responded yes, but added that Gilbert wasn't victimized (by DL 91) that he was aware

of. International is of course not so charged. DL 91 is so charged effectively and meritoriously (see part B above) of unfair labor practice commission in its failure to recall Gilbert on and after 11 March 1985. *Both* DL 91 and LL 707 are here additionally charged with an 8(b)(1)(A) coercion and restraint of Gilbert as a union member in refusing to allow Gilbert to be nominated as a candidate for election to the position of DL 91 dlr.

3. The Settlement Agreement of 5 February 1986

As earlier noted, LL 707 filed suit in the United States District Court for the District of Connecticut, in *IAM Lodge 707 v. United Technologies Corporation, Pratt & Whitney Aircraft Division*, Civil Action No. H-83-940. This matter was handled by attorney Gregg D. Adler of Kestell's firm. There LL 707 sought an enforcement of Arbitrator Porter's (initial) award, or, in the alternative, an order directing an arbitration of the (subsequent) grievance (of LL 707) which alleged noncompliance. On 3 December 1985, Judge Jose A. Cabranes ruled on the matter, and ordered the parties to resubmit the issue of Gilbert's status to the Arbitrator for this consideration and decision. In due course, the parties prepared to submit the compliance issue to the Arbitrator on 4 February 1986. All (arbitration) party settlement discussions ensued. On 5 February 1986, LL 707, Gilbert and P&W entered a certain Settlement Agreement, Release and Waiver, Resp. Ex. 6 (herein simply the Settlement Agreement).

The Settlement Agreement covers some 16 (Gilbert and LL 707) grievances in all, including the material discharge and noncompliance grievance(s). The Settlement Agreement also covers four NLRB charges (Cases Nos. 39-CA-808, 39-CA-1223, 39-CA-1924 and 39-CA-2820) brought against the Company, P &W; and finally, it en compassed the aforesaid Civil Action No. H-83-940. (Notably it did not extend to certain other (LRMDA)

federal action(s) brought, *inter alia*, by Gilbert against International, DL 91, LL 707 and related union officials, including Poulin. The aforesaid action(s) remained pending while the above Settlement Agreement was discussed and agreed upon. In that regard union counsel of instant record, also represented the unions in defending Gilbert's said (unresolved) federal action against the unions, apparently along with International counsel that represented International.

The General Counsel is not a party to the Settlement Agreement, though it appears that with the adjustment reached, all the above covered NLRB charges were (apparently) withdrawn. (The record establishes they are all inactive.) The Settlement Agreement contains a non-admission clause whereby (essentially) P&W by entering settlement discussion and the agreement itself, nonetheless reserves that it does not admit any violation of the Act, or of the collective-bargaining agreement, or of any other federal or state laws, or regulation.

The Settlement Agreement recites in its summary of facts, pertinently, that LL 707 ". . . argued that Gilbert was entitled to be reinstated to active employment through retroactive recognition of his appointment as safety representative, a position which was accorded superseniority under the collective-bargaining agreement. The Company opposed this argument and disputed its premises." In the latter regard the Settlement Agreement contains explicit provision that P&W does not admit what it had previously denied in the aforesaid proceedings. The Settlement Agreement does contain a summary recitation of certain facts otherwise, and that (essentially) the Settlement Agreement constitutes a settlement of all claims of Gilbert and LL 707, "with regard to the employment of Gilbert by the Company, termination of that employment, and any and all related claims. . . ."

The Settlement Agreement provides in its affirmative terms, insofar as pertinent, for a payment of backpay to

Gilbert in a sum certain. (The Settlement Agreement contains other provisions for settlement of other claims, including provisions for general nondisclosure of those settlement terms; but acknowledges anticipated use in (various) litigation, with provision made for party notice and protective procedures, etc., all of which considerations and conditions, by virtue of an all party (and P&W) agreed reduction of certain extraneous terms, have been effectively rendered moot, insofar as instant proceeding.) Materially, the Settlement Agreement specifically provides:

> Gilbert further acknowledges and agrees that his employment by the Company has terminated, such termination to be considered by all parties as a voluntary resignation of employment by Gilbert. Gilbert further agrees and acknowledges that he will not in the future apply for employment with the Company and the Company is under no obligation, to employ, reemploy, or retain Gilbert in employment in any capacity whasoever at any time. Gilbert specifically acknowledges that he waives any and all rights of reinstatement which might otherwise be available to him as a result of any claims or actions he has brought or could bring against the Company.

All parties to the Settlement Agreement agree, and General Counsel as well, that by the terms of the aforesaid Settlement Agreement, from on and after 5 February 1986, Gilbert had no right, or reasonable expectation of returning to employ of P&W, in any capacity.

In that regard, there is some evidence of record that Gilbert sought to raise at hearing an issue of purported LL 707 coercion of Gilbert in Gilbert's entry of the Settlement Agreement. Thus Gilbert asserts, and LL 707's attorney subsequently testifying on the matter has categorically denied, that when the terms of this Settlement Agreement were finally arrived at, that LL 707's attorney told Gilbert that the Settlement Agreement was (essen-

tially) a good settlement, and that LL 707 would accept it if Gilbert did not enter it. There is however appearance of record of substantial inconsistent testimony by Gilbert in this respect. Gilbert otherwise acknowledged that Alta Moran (essentially) so advised him. I need not resolve the apparent conflicts in the testimony above. Two facts are otherwise inescapable. First the Settlement Agreement contains explicit declaration that Gilbert has ". . . read the above Settlement Agreement, Release and Waiver, fully understood its content and effect, and without coercion, knowingly and voluntarily agree to its terms." Secondly, none of the parties to that agreement, nor General Counsel herein, has sought to set that Settlement Agreement aside, on the basis of coercion, or fraud. I will not (in effect) do so herein by denying the effect of its clear terms.

It is thus concluded and found that on 5 February 1986, Gilbert voluntarily undertook certain action in settlement of his (and LL 707, as well, of its) claims against P&W in return for other settlement terms and provisions deemed good and sufficient to them at the time; and with a clear consequence to Gilbert's status as a P&W employee, namely that from on and after 5 February 1986, Gilbert had no further claim to, or anticipation of employment at P&W. It follows that Gilbert could not qualify for subsequent dlr February nomination and April election on the basis of employment in a P&W shop represented by a LL affiliated with DL 91.

Neither was Gilbert employed by a LL affiliated with DL 91. Rather at this time he was employed by NAGE.

4. IP rulings on dlr qualifications.

In that regard Respondent has introduced credible documentary evidence of the circumstances of others who were found not qualified for dlr nomination by the IP, by virtue of not working at the trade. Thus by letter dated 20 December 1985, (then) assistant Directing LR

Webber wrote Poulin (essentially) requesting a review of the employment circumstances of Lou Kiefer, and asking that Kiefer be declared eligible to run for dlr in 1986. Webber appears to have also urged he was victimized. It will be recalled that Kiefer, a DL 91 employed editor organizer, was (only) laid off on 30 June 1983. In November 1983 Kiefer had obtained employment with another employer, Connecticut United Labor Organization (ULA). In September 1985, DL 91 employed Kiefer part time (on loan from ULA) to assist in organization preparations for negotiations (with P&W) in late 1985. (Kiefer's prior DL 91 position was apparently removed from the Bylaws of DL 91 and he couldn't be recalled to it.) By letter dated 31 December 1985, the IP advised Webber that Kiefer would not qualify "in view of the fact that he does not meet the qualification of working at the trade for one (1) year prior to the date of nomination." However, Kiefer had no unexpired *elective term of dlr office* from which he was laid off, nor had DL 91 unlawfully refused to recall him to that position.

Similary, by letter dated 30 December 1985 Webber wrote Poulin stating desire to put Christy Hoffman on as an organizer, or alternatively that Hoffman be declared qualified to run for dlr. Hoffman's circumstances were that Hoffman, previously employed by P&W at its Southington plant, had been employed by International as an organizer between January and July 1985 (for more than 6 months in 1985). At that time she apparently (voluntarily) left and became employed as an organizer by National Hospital and Health Care Employees Union, Ohio State Employees Campaign. By letter dated 13 January 1986, the IP advised Webber that Hoffman's employment with Local 1199, SEIU (sic) would not qualify as working at the trade under the Constitution, *and* Hoffman (additionally) would not qualify for DL 91 dlr position in that she would not have the (DL 91)

required one (1) year working at the trade as of February 1986.

Further letters of Hoffman, dated 14 and 18 January 1986 sent directly to IP, in several aspects questioned the application of DL 91's working at the trade for one year standard, and sought review and reevaluation of her qualifications. Those inquiries, and inquiry of LL 1746-A Shop Chairman Bill Shortell (in support) were unavailing. I present IP responses to them for their recitment of IP rulings. Thus in response to Hoffman letter of 14 January 1986, by letter dated 21 January 1986, the IP first informed Hoffman directly:

> Please be advised that Section 4, Article XI, of the IAM Constitution requiring a candidate for Business Representative to be working at the trade for one (1) year immediately prior to nominations is and always has been interpreted as one (1) full year, not merely one (1) day one, (1) year prior to nominations.
>
> Insofar as District 91 Bylaws, the requirement that a candidate must work for a full year either for the Union or in the shop prior to nomination is interpreted and has always been interpreted as a full year immediately prior to nominations.

In response to Hoffman letter of 21 January 1986, by letter dated 28 January 1986, the IP further informed Hoffman, more specifically:

> Please be advised that the qualification working at the trade for one (1) year immediately prior to their nomination is spelled out in Article XI, Section 4, of the IAM Constitution and all exceptions to the one (1) year working at the trade prior to nominations are spelled out under Article II, Section 4, Qualifications of Delegates and are very specific.
>
> In reviewing your circumstances, you do not fall under any of the exceptions and, therefore, would

not qualify as a candidate for Labor Representative in District 91.

Let me assure you that this is a consistent interpretation of our Constitutional law as I have no authority to change our Constitution. I take exception with our opinion that it appears at face value that our Constitution and District Lodge 91 Bylaws should be interpreted to allow a gap of less than a year between working at the trade and Labor Representative nominations. If your interpretation of that section of our Constitution and the applicable sections of District Lodge 91 Bylaws would be used, it would simply mean that a person to qualify for a position only need to be employed on one (1) day and that day being the date exactly one (1) year prior to the day of nominations. I assure you that it is not the intent that the Delegates to our Constitutional Conventions nor for that matter the Delegates to District Lodge 91 had in mind when placing those particular sections into our law.

* * *

Let me assure you that the decision and interpretation of our Constitutional Law is exactly that. It is the same interpretation that has always been given and has no bearing on you as an individual, nor your qualifications to do the job if, in fact, you were eligible to seek nominations.

In response to Shortell letter of 21 January 1986 (in supporting Hoffman), the IP wrote Shortell in letter dated 29 January 1986, in pertinent part as follows:

* * *

Insofar as Sister Hoffman's eligibility to run for Labor Representative of District Lodge 91, I have on several occasions outlined the reasons why Sister Hoffman does not qualify to run for Labor Representative under our Constitutional Law as well as

District Lodge 91 Bylaws. Here again, I have no authority to change the Constitution or amend the Constitution only to interpret it.

* * *

However, I would like to assure you that the Constitutional clause in question is not open to such broad interpretation that it could be interpreted to permit her to qualify as a candidate for Labor Representative. That Constitutional clause is very specific and has been interpreted in the same manner in every instance when the question has arisen.

I assure you that the interpretation given to Sister Hoffman has no internal political ramifications and that she is not being unjustly denied the right to run. Insofar as Grand Lodge failing to hire her, let me point out to you that we still have members of the Grand Lodge Staff on layoff due to our loss of membership.

* * *

Finally Poulin also testified that Paul Kelly was a glr on (apparently) his predecessor's staff who was also laid off. Poulin testified to having received inquiry on Kelley's qualification to run in the DL 91 dlr election conducted in June 1985. Kelly was found (by IP) not qualified because Kelly was not working in any P&W plant or for DL 91 or LL 707, and thus was not eligible under DL 91 Bylaws. The above evidence is wholly persuasive that Gilbert's employment by NAGE did not qualify him to run for dlr as "working at the trade." But that is not the only way a member might qualify for nomination to dlr; and *neither Hoffman, Kiefer, or Kelly were laid off elected DL 91 dlrs with unexpired term*, nor had DL 91 unlawfully refused to recall any of them to that position.

There is no question that there is requirement that an individual be working at the trade for one year. Gilbert was clearly laid off (initially) for more than 6 months,

and thus the requirement of working at the trade for one year would appear applicable to Gilbert and it appears to follow that Gilbert did not satisfy the requirement of working at the trade. That is, unless some other consideration applies. There is such other consideration. As an (unresigned) incumbent dlr, e.g., one with term expiring on 30 April 1986, Gilbert has contended he was eligible for nomination; and Respondent unions have presented no specific instance where it has been previously been held by IP to the contrary.

5. The evidence of DL 91 and LL 707 prevention of Gilbert's running for dlr position.

a. *Initial reactions to Board Decision issuance (in regard to ALJ Lawrence decision) on 16 January 1985.*

On 16 January 1985, the Board issued its decision in which it adopted ALJ Lawrence's findings that International, DL 91 and LL 707 had violated Section 8(b)(1)(A) of the Act by LL 707 lapse of Gilbert's membership, and Gilbert recalled (as subsequently clarified), that on the day after (receipt of) the decision he, along with Alta Moran, went to LL 707, and first attempted to pay his dues. On that occasion, Gilbert approached union secretary (office clerical) Eleanor Glynn and announced that he was there to pay his dues. Gilbert recalled that Glenn first went to the safe to retrieve Gilbert's records, preparatory to making calculations to the amount due. However, Glenn was hesitant about accepting dues from Gilbert, and she inquired if Gilbert would mind if she called to check if this was okay. Gilbert told Glenn, "Ellie, do what you have to do." Glenn then placed a phone call. After the call, Glenn told Gilbert that she was waiting for a return call from Almeida to see if it was okay to accept Gilbert's dues. Gibert told Glenn that when Almeida called back to please let him talk to Almeida.

After about 10-15 minutes, Glenn received a call. She spoke 1-2 minutes, and then told Gilbert to get on the phone. According to Gilbert, Almeida told Gilbert that they were not going to accept his dues payment, and that the Union was going to appeal the Board's decision. (Although Gilbert initially added that Almeida had said the appeal was of Board decision to allow Gilbert to be a member, pay his dues *and* (additionally) run for office, the latter run for office was not recounted in Gilbert's later description of the conversation. I am more persuaded that the reference to run for office attributed to Almeida on this occasion is instances of Gilbert embellishment, and that what Almeida more likely said on this occasion was only that LL 707 was going to appeal the Board's decision, and it was not going to accept Gilbert's dues.

However, I do credit Gilbert testimony that on this occasion Gilbert told Almeida that he wanted to pay his dues so he would be eligible to run for dlr position in the upcoming elections. Almeida told Gilbert that if Gilbert didn't like that (decision), Gilbert could call union attorney Engelhard, and make a direct appeal to him. That ended the conversation and Gilbert hung up the phone. Gilbert did not personally contact Engelhard. Gilbert contacted his own attorney, Brad Gallant, an attorney of counsel of record's law firm. In due course, discussions between the above attorneys ensued; and some time later attorney Brad Gallant informed Gilbert that it had been worked out; that the Union was going to accept Gilbert's dues; and that Gilbert should go down to the Union and pay the dues.

Almeida has not denied this conversation with Gilbert; and Glenn has not testified. Moreover, Gilbert's account of informing Almeida as to his purpose in desiring to pay the dues at this time is wholly consonant with other credited facts of record. I credit Gilbert that soon after the Board had issued its decision adopting ALJ Law-

rence's findings, Gilbert made Almeida personally aware that Gilbert planned to run for election to dlr office.

b. *Gilbert's nomination rejected at LL 700*

i. *Almeida instructions to assigned dlr Rondeau.*

Rondeau is a member of LL 743 (Hamilton Standard). As an incumbent dlr, Rondeau was reelected in July 1982, but ran unsuccessfully for further election in 1986. Rondeau's term of office as a dlr would thus end on 30 April 1986. However, in all times material herein, Rondeau was a DL 91 dlr. As such, and in the material time of the election of 1986, Rondeau was assigned to assist LL 700 (Middletown). Part of Rondeau's dlr responsibility was to attend LL 700's meetings, and act as overseer. Rondeau explained the latter as being that if a question came up on DL rules, Rondeau's responsibility was to advise LL 700 on DL 91 Bylaws.

The LLs may, and do hold their nomination meetings on different days in February. The nominations must only be accompuished in February. Called as a witness by General Counsel, Rondeau has testified that on the Friday before LL 700's nomination meeting, which he relates was held on the second Sunday in February (9 February 1986), thus (I find) on Friday, 7 February 1986, glr Almeida called Rondeau on the phone in regard to LL 700 nomination process. Rondeau (initially) testified that Almeida told Rondeau that if Gilbert's name was brought up for a dlr nomination it would be a violation of DL 91's Bylaws, Article 10 (continuing somewhat ambiguously) where it says you have to be an employee of the Company, or working for the DL, or something else. Rondeau would later testify however, more definitively, and more plausibly, that Almeida told Rondeau *that Gilbert couldn't be nominated because it would be contrary to DL 91's Bylaws, in that Gilbert was not employed with the Company (P&W).* Rondeau also recalled that at the time he asked Almeida why was that an issue (at LL level).

At the time of this phone conversation with Almeida, Rondeau asserts that he was already aware from a prior conversation at DL 91, and he believed from statement made by Almedia there, that there had been a settlement, and Gilbert would not be working with UTC (P&W) any longer. Rondeau then understood the (grievance) issue had to do with Gilbert's tenure with P&W based on whether Gilbert was an (appointed) health and safety representative (to be) recognized by the Company, but asserts we never got the full story. At hearing Rondeau has also testified that he *guessed* there were 2-3 issues.

Given Rondeau's indicated limited awareness of the grievance, and not other issues, *viz.*: of the nature of the Settlement Agreement encompassing (only) Gilbert's forbearance of a return to employment with P&W in the future, and Rondeau's clarification of Almeida's directive limited thereto; and in light of Rondeau's narrowed questioning of Almedia at the time, notably solely directed at a perceived procedure departure, rather than a consideration of other subject of substance (*e.g.* Gilbert's contended nonresignation, and retention of incumbent dlr status while on layoff), I am in the end persuaded that Rondeau's knowledge at the time as to Gilbert's base for nomination was most probably limited to his own awareness of the grievance subject and its resolution. Thus Rondeau also testified that when he asked Almeida why was that an issue, he added in explanation his interpretation (sic apparent understanding) was that if you were a member in good standing (you could receive a LL endorsement), and if you did, the LL-endorsed-nomination is then (to be) checked out by the DL recording secretary, who can reject the LL's endorsement of a nominee, based on whatever the facts are. It is clear to me that Rondeau was actually questioning Almeida on his perception of a departure from regular nomination procedures. Rondeau also testified that in the same conversation Almeida said that he (Almeida) had to call the other LLs.

ii. *Dlr Rondeau's and dlr Romegialli's actions at Local 700's nomination meeting*

There were eight dlr positions open at this time for nomination and election. Dlr Romegialli is a member of LL 700. As assigned dlr, Rondeau testified that he was overseeing LL 700's nomination meeting held on the following Sunday (9 February 1986). During the meeting a member nominated Gilbert for dlr position. According to Rondeau, Romegialli jumped up and said, the nomination of Gilbert was in violation of Article X of the DL's Bylaws; and it should not be allowed. Paul Schmelke, LL 700's president (and it will be recalled one defended by Gilbert on 1982 election charges) asked Rondeau if that was true. Rondeau told Schmelke that as far as he knew, he was told it was true. Schmelke thereupon did not allow Gilbert's nomination.

Romegialli confirmed that he was at LL 700's nomination meeting, explaining that he was there to seek a nomination and endorsement from his own local to run for reelection as an incumbent dlr. Romegialli also confirmed that Gilbert's name was placed in nomination by LL 700 member, Eddie Robinson (another individual previously defended by Gilbert). Romegialli's version is that he raised his hand to challenge the nomination and was recognized. Romegialli relates that he told the chair that it was his *best belief* that Gilbert did not meet the requirements of DL 91 Bylaws. Romegialli asserts he told the members that Gilbert hadn't been working at the trade for a year, and Gilbert was no longer eligible to work for P&W. (Objection to Romegialli assertion of his awareness of the Settlement Agreement terms from Company source was sustained.) I have no doubt the source of Romegialli's knowledge in that area was (at least) from Almeida.

Romegialli asserts further that he also told the members of LL 700 that it was his knowledge that Gilbert had resigned his position as dlr. Rondeau however testified that no one at this meeting said Gilbert had resigned as

dlr. There was no corroboration offered of either Rondeau or Romegialli on this latter matter of a reference to Gilbert resignation. There is confusion of record as to whether Romegialli was first made aware of the actual content of Gilbert's conditional letter of resignation to Tracy in May 1984, ar 1985. However, there can be no question that Romegialli had an awareness of the conditional content of that letter as of this nomination meeting held on 9 February 1986. Romegialli has otherwise acknowledged that he had a couple of questions, and that he referred them to Almeida, but later as he recalled on 12 February 1986. Romegialli has (generally) denied there was a discussion between Almeida and Romegialli about a conditional resignation by Gilbert. Romegialli's version is again too strained to fully credit.

First, it is inherently likely that questions Romegialli had (if any) on Gilbert's status would have been addressed before LL 700's nomination meeting held on 9 February 1986, and far more likely on the prior Friday, 7 February 1986, just as in the case of Rondeau. Secondly, given Almeida (general) acknowledgement that instructions were given out that (all) LLs were to follow DL 91 Bylaws requirements, discussed next, it is as likely that dlr Romegialli was contacted by Almeida about Gilbert nonemploy at P&W as was the case within Rondeau. See also Parent's essential further confirmation that there *were* DL 91 discussions about Gilbert's eligibility. Thirdly, whatever may have been the moment of Romegialli's initial awareness of the actual content of Gilbert's conditional resignation, e.g. in May 1984, or 1985, Romegialli had been aware of it for quite some time. But that was a matter on which DL 91 had already taken a determined position that Gilbert had resigned e.g. at time of Gilbert's nonrecall. Put simply, I do not believe Romegialli spoke to the members of LL 700 in the manner of hearing hedged testimony couched, in terms of *best belief* that Gilbert was not eligible to be nominated. This is in contrast with Rondeau's (I conclude

more credible) recollection that Romegialli jumped up and said flatly that the nomination of Gilbert was in violation of Article X of DL 91's Bylaws; and it should not be allowed. In the end, I credit Rondeau that no one mentioned Gilbert's resignation in this meeting, because I do not believe it was perceived as a viable issue by Romegialli at this time, and because DL 91 attention was being directed at the ramifications of the recent Settlement Agreement, under the terms of which it was known and/or reported that Gilbert would not be employed in a P&W shop in the future.

Almeida describes his function with DL 91 as having been one of providing assistance to DL 91, in light of his own broad DL experience. Webber was Directing LR at this time. As noted Almeida confirmed there was an instruction that went out directing the LLs that all nominations must be in conformity with the Constituion and DL 91 Bylaws. Webber was not testified thereon; and in that connection Almeida further testified that it was his understanding that Webber was to make IP inquiry on Gilbert eligibility, *infra.*

Almeida has asserted that he did not (personally) instruct that LLs that Gilbert was not to be nominated nor did DL 91 to his knowledge; that he didn't know if instructions were issued to DL 91 affiliated LLs that any nomination made on behalf of Gilbert was to be rejected; and Almeida asserts he had no idea if Gilbert's name was mentioned. In these respects I find Almeida assertions are reserved ones, and in any event are wholly unconvincing. Almeida has not explicitly denied the above conversation with Rondea, nor for that matter even the Romegialli asserted conversation about Romegialli questions, or Parent's testimony about a phone call/staff meeting discussion about Gilbert's eligibility to run for dlr. Any such Almeida total disclaimer is simply not to be credited. Rather I credit Rondeau, and I find there was Almeida distribution of information (at least) about Gil-

bert no longer being employed by P&W, and that DL 91 Bylaws (in that respect) were to be applied.

c. *Gilbert's allowed payment of LL 707's dues; Nixon-Gilbert confrontation*

The following is a composite of credited testimony of Gilbert, Mary Alice Moran, dlr Parent, LL 707 president Nixon and limited testimony of glr Almeida. On 14 February 1986, Gilbert again wen to LL 707's office to pay his dues. Mary Alice Moran accompanied Gilbert on this occasion. Gilbert observed the time of his arrival. It was (I find) 3:08 p.m.. According to Gilbert, it normally takes five minutes to pay dues. This time it would take Gilbert about 50 minutes, as Gilbert and Moran would not leave the hall until almost 4 p.m.

Gilbert relates that he first approached union office secretary Glenn, and said he was there to pay his dues. Glenn spoke to dlr Parent who at this time serviced LL 707. Parent confirms that Glenn told Parent that Gilbert was there to pay his dues, and Glenn asked Parent to assist her. Parent relates that he walked out of his office, and he asked Gilbert what Gilbert wanted. Gilbert told Parent that Gilbert's attorney had informed Gilbert that it was okay to come to LL 707, and they would accept Gilbert's dues. Parent told Gilbert that as far as Parent knew, Gilbert was a nonmember, and Parent said he would have to check. Parent testified that at the time he wasn't familiar with the *Board's* decision directing the Union to reinstate Gilbert as a member.

Gilbert relates that he observed Parent place a call from his office. Parent recounts that he (first) called his boss, assistant Directing LR Drosehn. Following that conversation Parent told Gilbert that he was going to check it out with his representative (glr Almeida) to see if it was correct, and if they would accept Gilbert's dues or not. Gilbert confirms that Parent came out and told Gilbert that Parent had to check this out with his people;

and that Parent was waiting for a call back (I find) from Almeida. Gilbert told Parent that when the call came in, Gilbert would like to talk to Almeidda.

Gilbert states that it was shortly after that that Almeida called; and he and Almeida had a conversation. Gilbert told Almeida that it was his understanding that you were going to accept my dues today. Gilbert testified that Almeida replied, "You have only been in the union hall 5 minutes, don't start giving orders." Gilbert told Almeida, it shouldn't take more than 5 minutes for a union member to pay their dues; and Gilbert said that he didn't want to be treated any different than any other employee. Almeida told Gilbert that they had to protect their rights. In this respect, Gilbert later acknowledged that it was just before his own visit to the hall that Gilbert had been informed that a letter confirming the conditions (for an acceptance of his dues at this time) was being sent to his attorney. There is no question that Gilbert was (at least) generally aware, before he visited the hall to pay his dues, that there were to be certain union conditions attached to the acceptance of his dues.

Gilbert (again) told Almeida that he wanted to pay his dues so he would be able to run for dlr. Gilbert further asked Almeida, now that they were about to accept his right to run for dlr. According to Gilbert, Almeida replied (only) that he wasn't personally going to be at the LL (707) meeting that Sunday (16 February 1986), but that he had instructed "our guys" to comply with the Bylaws of the DL and LL. Gilbert testified that Almeida did not further explain who "our guys" were. Gilbert recounts that Almedia thereafter spoke to Parent for a while, and Gilbert saw the (phone) light go out, indicating their conversation was over.

Almeida testimony does not address this specific conversation with Gilbert. Parent confirms only receiving a call from Almeida, and that as a result of Parent's conversation with Almeida, Parent awaited still another call

from attorney Linda Rodd, of Engelhard's firm. Parent testified that it was not until he received the call from Rodd that he actually processed Gilbert's dues payment, and instructed the secretary to accept his check. Parent has confirmed (as noted earlier) that he had had a discussion with Almeida earlier, a matter of days before this day, either by phone or at a staff meeting, about Gilbert's eligibility to run for dlr in the upcoming elections. According to Parent, there was no discussion at that time about Gilbert's dues tender. Beyond that, Parent does not appear to have described the discussion with Almeida about Gilbert's eligibility to run for dlr.

Gilbert has testified that he thereafter observed Parent playing around with papers, shuffling papers around. I reject any aspersion that Parent was performing make-work, rather than waiting for a clarifying call. Gilbert has acknowledged that he felt they were being jerked around, and that he got upset. This I credit. According to Gilbert, after several minutes, Gilbert asked Parent, "Jim, what's the story? Let's pay the dues and get on with this." According to Gilbert, Parent replied, "Well, you are going to have to wait for President Nixon to come in." Gilbert said, "President Nixon is on first shift. He won't get out of work until 3:30." Gilbert asked, "Why should we have to wait that long? Why should Mary Alice and I be burdened by having to hang around waiting for Walt Nixon to show up?" According to Gilbert, Parent replied, we had to wait for Nixon because Nixon was the one who had been instructed by the Union's attorneys as to the conditions for the acceptance of Gilbert's dues. (Parent denied he wanted Nixon involved in the dues acceptance.)

Mary Alice Moran, in that connection, recalled that Parent had (earlier) said that he had not been instructed what to do (about acceptance of Gilbert's dues payment), but he knew Nixon had said he wanted to speak to Gilbert. According to Moran, Gilbert had then asked Parent

to call Almeida because it was Gilbert's understanding everything had been set up to pay his dues, and that was what Gilbert was there for. Moran recalls that Parent then told Glenn to get Almeida on the phone. Moran didn't recall Parent saying that he would have to speak to Drosehn, and she didn't think he said he did. Moran otherwise has not corroborated Gilbert that they were required to wait for the arrival of Nixon. I am convinced that Moran's recount of Parent initial reaction is the more likely, and that Gilbert's references to waiting for Nixon, if made at all, more probably arose in the context recalled by Moran, *viz.*, antecedent to his own request made of Parent to call Almeida. I am in any event convinced that Gilbert and Moran were not waiting for Nixon's arrival, but for the call from union attorney Rodd, as Parent otherwise related. However, in the interim Nixon did arrive at the hall.

As President of LL 707, Nixon had (I find) earlier received a copy of the Settlement Agreement on LL 707's grievance(s). Nixon testified that he received the copy from Parent in a *sealed* envelope. Nixon opened the envelope, and he read the *full* terms of the Settlement Agreement. Thereafter he put the Settlement Agreement in LL 707's safe. Nixon asserts he discussed the terms with no one thereafter, and testified specifically that he did not discuss it with Parent.

Between 3:35-3:45 p.m. Nixon walked into the hall. When Nixon saw Gilbert and Moran standing at the counter, Nixon turned to Glenn and said, "What's this all about?" Glenn answer, Wayne is here to pay his dues. Gilbert's recollection is that Nixon then said, "Well then hurry up about their business. It stinks in here." Nixon essentially confirms that he wanted to know what Gilbert was doing there, but denies that he said, "It stinks in here." However, Moran corroborates Gilbert that when Nixon case in the hall, he made a comment that it smells, or it stinks in here. I credit Gilbert and Moran recollec-

tion as to Nixon's opening remark; and I further find that it was unprovoked by any earlier Gilbert derogatory remark directed towards Nixon that day. I also credit Moran recollection that when Gilbert then said to Nixon that he (Gilbert) understood that Nixon wanted to talk to him, Nixon (essentially) said he didn't want to talk to Gilbert, that he wanted them out of here, and to get Gilbert out of here. With that, Nixon went into the office to talk to Parent.

Either Parent or Nixon closed the door behind them. While a number of witnesses proceed to relate that Gilbert thereafter came into the office uninvited, the weight of credible evidence convinces me that Gilbert did not do so immediately; and I specifically find he did not do so until after attorney Rodd's call had come in. Parent otherwise testified that the president is in charge of the LL, and Nixon wanted to find out what was going on. In the interim, Parent thus explained the situation to Nixon in their office, and that he was awaiting the call (from Rodd).

Gilbert and Moran were outside the office by the counter. Weight of credible evidence also makes it appear clear that when the call from Rodd eventually arrived, Gilbert picked up an extention. Gilbert did so on his own, without being asked to do so; and he immediately engaged Rodd in conversation. Gilbert asked attorney Rodd what was happening to the payment of dues, and why it was taking so long. (Moran corroborated hearing Gilbert say, "Hello Linda. What's going on? I understand this was supposed to be all straightened out.") Gilbert asserts (generally) that Rodd explained it to him, and then Rodd spoke with Parent. However, I credit Parent's further recollection that Gilbert also told Rodd, "I don't have to put up with this (delay). They have to accept my dues. You know it." I relatedly find that Gilbert did not pick up the phone to eavesdrop, but as an impromptu act as a result of increasing irritation

over the delay he was experiencing at the hall in his attempt to pay his dues, pursuant to a purported pre-arrangement with the Union.

Gilbert has testified that after another 5 minutes he opened the door to the office, without knocking, or being invited. Gilbert acknowledged that Parent was on the phone. According to Gilbert recollection, "Parent said, "Do you mind if we have a few minutes to talk to our attorney alone? Gilbert replied no, and closed the door. On cross-examination Gilbert further testified that Parent had said he need time to talk to his attorney; and that Parent had asked, if Gilbert could give Parent that courtesy, and some time. Although, Parent had recollection of Gilbert entering the office only once, I am wholly convinced Gilbert did so twice. The first occasion (above) was a brief one; and most probably occurred while Parent was still talking to attorney Rodd. I simply do not believe that Gilbert would have acknowledged that circumstance, if it had not been a fact.

Parent confirms he was given information by attorney Rodd as to how they were to accept the dues, under what terms, and what language was to be given to Gilbert; and that it was not until thereafter that he accepted Gilbert's dues. However, I have no doubt that Parent and Nixon had also continued with some additional discussion amongst themselves, about their *having to take* Gilbert's dues.

The conditions imposed in writing on Gilbert's dues receipt by Parent, pursuant to Rodd instruction, appear of record in a subsequent Nixon letter to Gilbert dated 20 February 1986, which states as follows:

> Dues accepted subject to our right to seek review of the N.L.R.B. order upholding Administrative Law Judge Lawrence's Decision and subject to our right to invoke the *status quo ante* and nullify any nomination or other incident of membership should our position be upheld on review.

Gilbert thus testified credibly that he observed the light on the phone (extension) go out, indicating Parent's conversation with attorney Rodd was over. Gilbert waited a few minutes more. (Moran corroborates he waited 2-3 minutes.) When either Parent Nixon had come out by that time, Gilbert went back into their office, again without knocking. Gilbert recounts that he said to Parent, "Let's pay my dues." Nixon has testified that Gilbert said, "I'm tried of this shit, what's taking so long." (Nixon wrote this down.) Nixon also asserts that in their conversation Gilbert also called Nixon a f------ asshole. (Nixon has also testified that Gilbert called him the same thing in a 1984 meeting.)

Moran was not in the office. Moran asserts that she did not hear the conversation in the office; nor did she observe what happened in there, though she was aware Gilbert was in there, for not more than five minutes. Parent recalls that Gilbert came in the office and asked what was the delay; and, in a loud voice said, "I am not going to wait all day," and, "What are you guys doing?" Parent initially related that Nixon told Gilbert to get out of the office, they were having a discussion. Parent relates Gilbert said he wasn't going to leave, and the discussion between Nixon and Gilbert then became heated.

On cross-examination, Parent recalled that Gilbert asked, "Why do I have to wait so long"; that Nixon said, "Hey, we are in process of taking care of your dues. This takes time." Gilbert replied he had been there for a half hour, or three quarters of an hour. Parent initially testified that while Gilbert was still talking to Nixon in a loud voice, if he recalled right, Gilbert called Nixon a f------ asshole, though he later testified that comment stuck in his mind most. Parent testified that Nixon hadn't said anything derogatory to Gilbert before that remark of Gilbert. I am persuaded that Gilbert made the remark that Nixon firmly, and Parent somewhat less so, have attributed to him; and that Gilbert likely did so when

Nixon said there things take time. I credit that Gilbert made the remark largely because of my convictions on what followed.

Gilbert's version of the conversation continues that Nixon said, "You think you are a smart guy, don't you? I am not afraid of any lawsuit you have, and you are going to get what's coming to you." Gilbert (alone) has testified that Nixon then picked up a wooden chair, and placed it between them, asserting it was like Nixon was going to hit Gilbert with it, or press Gilbert against the windows. However, Gilbert acknowledges that Nixon didn't touch Gilbert. According to Gilbert, Nixon then ordered Gilbert out of the room. Gilbert told Nixon that he would leave when he was allowed to pay his dues. According to Gilbert, Nixon then ordered Parent to finish the collection of Gilbert's dues outside the office, at the counter. Morgan did not see the incident, and does not corroborate Gilbert's account of the chair incident.

Nixon denies he picked up a chair in the presence of Gilbert; and Nixon asserts that when Gilbert raised his voice and said he was tired of this shit, etc., Nixon told Gilbert to get out of his office. Nixon otherwise confirms that Gilbert refused to do so, until Nixon instructed Parent to take Gilbert out of the office, and (essentially) conduct the business outside at the counter.

Parent has testified that he didn't see Nixon pick up a chair, or do anything against Gilbert. Parent also testified that there was no pushing or shoving; and, if there had been, he would have seen it. Of the latter, I am wholly convinced, for no one has asserted it to be otherwise. Parent did confirm that when Nixon told Gilbert, "Get out of my office," Gilbert said, "I want my dues tendered (sic). No other people have to go through this." Parent also testified that Nixon told Parent if Gilbert had business and we *had to* accept his dues, to do it in the financial section. Even more significantly Parent testified that as he didn't want a confrontation, he then

asked Gilbert to leave, saying, "Come on, let's go take care of the business." Gilbert and Parent then left the office.

First, I do not believe that Gilbert has falsified this incident of the chair, so much as embellish it in his favor. I am persuaded that Nixon probably did make a motion of picking up a chair and placing it between Gilbert and himself, and right up close to Gilbert. However, I am convinced it was at best a moment of emotional exuberance immediately discontinued. I further am convinced that Nixon did not menace Gilbert at all, so much as simply lose his cool, immediately recognize it, and then tell Parent to take Gilbert's dues outside, if they had to do it. Parent took his cue immediately to do just that, before any physical confrontation (actually) did develop.

Parent relates that he went to the financial area; and that as he did, Moran kind of poked him, saying she had places to go to. Parent told Moran that if she had dues payment business he would take care of her after Gilbert. Gilbert recounts that at the counter, Parent wrote out a statement (on his receipt, discussed *supra*), signed off on Gilbert's dues card, stamped it; and he took the money from Moran. Moran confirms Parent did the paper work and they exchanged checks and receipts.

According to Moran, however, by this time, Nixon had come out of the office to a point near the copy machine. Moran testifies that Nixon said to Parent, "Hurry up and get them out of here, and let them crawl back under the rock they came out of. Moran acknowledges that she made a couple of snide remarks back at Nixon, namely, that she really didn't care to invade his living room; and, some people act like apes.

At about this time, LL 707 recording secretary Frank Alteri came into the hall. Moran knew that Gilbert had a letter to deliver to the recording secretary, and said to Gilbert, "Frank's here. Why didn't you give him your

letter." (The letter was a Gilbert acceptance of nomination required to be on file in advance, in the event the member was not at the meeting when nominated.) Gilbert testified: that he attempted to hand the letter to Alteri; that Nixon instructed Alteri not to accept the letter from Gilbert, and said that he (Nixon) would deal directly with Gilbert. Alteri however accepted the letter from Gilbert. Moran confirmed, with somewhat more definitive testimony, that Gilbert called Alteri over; that Nixon told Alteri to stay where he was, because he (Nixon) would accept anything Gilbert had to give the Union; that Alteri came over anyway; and that Gilbert gave the letter to Alteri, and explained what it was. Gilbert and Moran then left the hall, close to 4 p.m.

d. *Nixon's prevention of a LL 707 nomination of Gilbert for dlr*

Two days later, on Sunday, 16 February 1986, Gilbert attended LL 707's scheduled nomination and endorsement meeting. Gilbert arrived at about 10 a.m. No one challenged his right to be there. Nixon presided, and chaired the meeting. In due course, LL 707 nominations began. Gilbert relates that member John Jerome put Gilbert's name in for nomination. According to Gilbert, Nixon promptly ruled that Gilbert could not be nominated. Nixon read aloud DL 91 Bylaws, (Article X) Section 3 (*supra*) to the members. Gilbert as promptly took an exception to the Chair's (Nixon's) ruling. Gilbert asserts he said he was a member in good standing, and that he believed he qualified for reelection as an incumbent, or words to that effect. In prior affidavit, Gilbert had asserted, "I believe I also referred to two labor board orders." When cross-examined as to the cases not involving dlr recall, Gilbert retorted they had to do with all the rights that should have been given him. Nixon ruled Gilbert out of order.

Nixon has denied that he had a previous discussion with Almeida about the eligibility of Gilbert to run for

dlr office. Nixon testified that he disqualified Gilbert. Nixon asserts he prepares for a meeting 3-4 days prior. Nixon asserts that it had crossed his mind that Gilbert's name would be placed in nomination; that he personally read DL 91's Bylaws requirements; that he (alone) made the determination to disqualify Gilbert; that he knew Gilbert had not been working at the trade for a year, and (*initially*) asserted that is what he based his decision on; and that he discussed the matter with no one, not even his own executive board. Nixon has acknowledged that of the 10-15 other members put forward for nomination to dlr, only Gilbert's nomination was disqualified. (The required LL 707 runcff, e.g. to get the number of names placed in nomination down to the number allowed for the open dlr positions, was never accomplished, due to subsequent developments.)

On second occasion Nixon has asserted that he disqualified Gilbert on basis of (lack of) membership for 2 years in good standing, and, because Gilbert wasn't working at the trade for one year prior to nomination. At best, only with additional testimonial strain, has Nixon related the base of disqualification included an additional reliance on the fact that, by virtue of the recent Settlement Agreement, Gilbert *would no longer be employed at P&W, thus was not employed in one of the shops under the jurisdiction of DL 91.* To extent Nixon testimony may be deemed eventually to have retracted a reliance on Gilbert's nonmembership it is simply not credited. (I am wholly convinced that was an operative consideration for Nixon, whether stated by him at that time, or not.) Nixon did acknowledge claim by Gilbert of having paid his dues; and a reference made to the Labor Board; but otherwise asserts only there was a lot of rambling on by Gilbert. Nixon does not explicitly deny Gilbert claim of being qualified as a member, and an incumbent dlr.

In regard to DL 91 Bylaws requirements Gilbert testified that he had a general awareness of them at the time,

and had greater awareness of them thereafter. Relatedly Gilbert has acknowledged, that at the time (of attempted nomination) he was not employed in the (P&W) shop; that he was not employed in the industry; and that to be eligible he had to be either employed by the DL, or victimized. As noted, Gilbert asserted (at the meeting) that he believed he qualified, being both member in good standing, and (essentially) an incumbent dlr.

Nixon testified that the nomination meeting was not completed because Gilbert and Mary Alice Moran continued to interrupt him; that they would not need the chair's decision to sit down; that he ruled Gilbert out of order more than three times; that he asked them to leave; and that Gilbert would not leave. Nixon testified that Gilbert said, "You can call the police, like you have done in the past, but I am not leaving." Nixon relates he started to lose control; people got upset; they started heckling; and the whole meeting was disruptive (sic). In contrast with Rondeau's apparent permitted presence at LL 700's nomination meeting, Nixon asserts that at LL 707, the dlr (apparently Parent) had to exit while the nominations were in progress. As noted, Parent has not testified as to what exactly was earlier told him about Gilbert's eligibility by Almeida, nor as to his exclusion at this meeting.

In contrast with his general knowledge of DL 91 Bylaws, Gilbert held himself out as an expert on the conduct of LL meetings. Gilbert testified that at that nomination meeting he insisted on his right to challenge the Chair's ruling on the disqualification of his nomination. In that respect Gilbert has acknowledged that Nixon ruled him out of order on the same matter, on several occasions, at least three times; but Gilbert insisted on his right to speak. (Another member (Moran) challenged the chair's ruling, and she was also ruled out of order.) Gilbert acknowledged that Nixon asked Gilbert to leave the room,

and to leave the hall; but Gilbert did not, and continued his challenge to the chair.

Gilbert testified that his concern at the time was the challenge to the Chair, and the (non) recognition of it. Gilbert has testified that he (first) tried to explain to Nixon that under the Constitution, and Roberts Rules of Order, if the Chair is challenged on a ruling, the Chair *has to turn the gavel over to the vice president and accept the challenge.* Constitution and Bylaws appear to fully support that position. (See G.C. Ex. 4, Act XXII, Rules of Order for LLs, Eecs. 14-15, pg. 78.) The Chair's ruling is then either (to be) sustained, or rejected. According to Gilbert's (uncontested) testimony that required procedure was not followed. However, Gilbert has (essentially) acknowledged that during their discussion he also told Nixon that Nixon didn't know the Constitution and Bylaws, or a combination of the two, and/or did not know them well enough to properly conduct the meeting.

Gilbert relates that Nixon called a recess. Gilbert asserts that Nixon did not explicitly state the reason for calling the recess. Gilbert however, acknowledged that in challenging the Chair, Gilbert had raised his voice, though Gilbert denied he was shouting. Gilbert moreover conceded that he heard heckling (of Nixon) and other comments at the time. Finally, Gilbert has acknowledged that he believed Nixon had called the recess, to summon the police; and, Gilbert further acknowledged that he also told Nixon that Nixon could go ahead and call the police, like Nixon did before. Gilbert did not leave the hall. The police were in fact summoned. Gilbert spoke to the police, Gilbert testified the police did not direct him to leave the hall, and he didn't leave the hall. Parent did not testify as to this meeting.

Nixon's testimony about adjournment vis-a-vis recess, in relationship to a call of the police, is confusing. Other-

wise Nixon acknowledged that he did call the police; that he did complain about Gilbert's conduct; that the police did not arrest Gilbert, nor did the police make Gilbert leave the hall. Nixon has also acknowledged the normal procedure for a challenge of chair ruling; and he acknowledged that he did not place the challenge to the chair before the body for a resolution Nixon asserts he held firm in his ruling, because he felt he could not overrule DL 91 Bylaws. Significantly, if not deja vu of LL 707 action in 1984, Nixon aserts he told Gilbert, that Gilbert knew the proper channels that Gilbert could go through.

Nixon (I find) subsequently reconvened the meeting. According to Gilbert, a point of order was immediately raised (by Moran), which itself has to be acknowledged, but wasn't. (The point of order addressed the question why the recess had taken longer than Nixon had said it would.) Gilbert relates Nixon made no response. Gilbert thought Nixon asked for a motion to adjourn. In any event Gilbert acknowledges there was a motion to adjourn. Although Gilbert did not recall a second, he did concede a vote was taken and the meeting adjourned, though with a "quick gavel," which Gilbert described as done without following prescribed formal language as to the vote taken, and results.

Nixon confirmed that he reconvened the meeting. Significantly, Nixon acknowledged that he made no effort (on that occasion) to continue the nomination process. Nixon testified there was a call for a motion to adjourn, a vote taken, the motion passed, and he adjourned the meeting. Nixon did not recall a challenge (sic) to the chair as to why the meeting was reconvened in excess of the time period he had set; and he testified that if Mary Alice Moran asked the Chair that, he did no hear her.

It is perfectly clear to me from the above that on 16 February 1986, president Nixon, and thus LL 707, intended to and did first deny Gilbert a dlr nomination,

and then denied Gilbert orderly process on the nomination of Gilbert to run for dlr. This circumstance, coupled with General Counsel's proper reliance on LL 707 hostility to Gilbert as found in ALJs Harmatz and Lawrence decisions, and otherwise evidenced herein as continuing, (I find) makes out a very strong prima facie case that as of 16 February 1986, Respondent LL 707 restrained and coerced Gilbert by failing and refusing to allow Gilbert to be nominated as a candidate for election to the position of DL 91 dlr, in violation of Section 8(b)(1)(A) of the Act, as alleged in the complaint.

Gilbert and Nixon (and former president) Nilson had another confrontation on 19 February 1986, on an occasion when Gilbert attempted unsuccessfully to vote in a LL 707 steward election. Gilbert was clearly not allowed to vote. Gilbert's testimony as to the reasons he was told he could not vote for steward are not as firm or convincing as other of his testimony on the nomination issue. Gilbert initially testified that he was told by the election teller, Jerry Birmingham, that Gilbert could note vote, but not why. Later Gilbert relates that he believed Birmingham told him that his name was not on the checkoff list, and he wasn't a member; and that he believed he told Birmingham that he was a (cash) member. Gilbert asserts that president Nixon was there, and that Nixon then told Gilbert he was not a member and could not vote, and also, that Gilbert was to leave the hall. Gilbert inquired of Nixon what grounds (thereby indicating Nixon had not earlier stated the grounds); and Gilbert has Nixon (then) say he was not a member, and should leave the hall. However, in later examination Gilbert acknoweldged that Nixon possibly told Gilbert that he would not vote for steward because he was not employed by P&W; and, that he was also possibly told to leave that (election) part of the hall, though he didn't recall that. I find Gilbert was precluded from voting for Steward, but I do not find Gilbert's assertions as to the

reasons given him are advanced in manner sufficient to be persuasive. Whether Gilbert properly was precluded from voting for steward is neither a matter of complaint allegation, nor necessary for further resolution herein.

Be that as it may, I do credit Gilbert's further recollections, on basis of largely uncontested testimony, that he thereafter asked Secretary Glenn to get the dlr (Parent); that Nixon instructed Glenn not to do it; and Nixon told Gilbert, I'm the assigned dlr today. They had left the election area and were walking toward the office at the time. Former president Nixon walked in. as Nixon asked Gilbert to leave the hall. According to Gilbert, Nilson butted in and said, yeah, why don't you leave. Gilbert asked Nilson, what are you, the acting president of the day. Gilbert then told Nixon that Gilbert wasn't going to leave, that he had business to conduct.

Gilbert relates he then asked Nixon for a copy of the Constitution and (apparently) DL 91 Bylaws. Nixon told Gilbert, you can get them tomorrow. Gilbert responded that he didn't want to come all the way back the following day, and that he would appreciate getting the copies that day.

According to Gilbert version I credit, Nixon first called Gilbert a low-life. Gilbert acknowledged that he in turn caleld Nixon "a slime,"; and, that quite possibly Gilbert also said LL 707 was "a slime ball organization," though at hearing Gilbert clarified he meant the heads of that organization, not the rank-and-file. According to Gilbert, Nixon then said that he had learned everything he knew from Gilbert. Gilbert retorted, if Nixon did, he didn't learn it will; and further stated, that he (Gilbert) had never treated anyone the way they were treating him in the office. As noted Gilbert's account is largely uncontested. There is no qustion that the hard feelings of LL 707's both current, and former president had continued against Gilbert unabated.

In addition to the recited LL 707 reservation language (in accepting Gilbert's dues), in the same 20 February 1986 letter to Gilbert, with copy to Counsel of Record, Nixon there advises Gilbert.

> As we explained to you at the time, as well as to your attorney Brad Gallant, we have not yet decided whether to seek review of the National Labor Relations Board's Order relating to your membership. We accepted you dues only upon the understanding that should the Board's Order be subject to review and should our position be sustained, we have reserved the right to revoke your membership and nullify any right or privilege extended to you by virtue of membership in Local 707 retroactive to May 1, 1984.

Moreover, by *separate* letter of same date, with copy to Counsel of Record, Nixon recites to Gilbert the formally (asserted) reason for his declared noneligibility for nomination on the there broader stated basis, and exclusive of lack of membership:

* * *

> 2. A member actively employed in one (1) of the shops coming under the jurisdiction of this District or employed by the District or one (1) of the Local Lodges affiliated with this District for a period of at least one (1) year prior to nomination. . . .

As you know, you have the right to appeal this determination pursuant to Article L, Sections 14, 15 and 16 of the International Constitution.

In regard to the above written declaration however, I have earlier observed the appreciable variance in Nixon's *testimony* as to the actual reasons for his declaration of disqualification of Gilbert's nomination including admission on nonmembership. I remain unpersuaded of this unconvincing disclaimer (if the same is tō be deemed effectively disclaimed at all), *viz.*, that Nixon's reasons

(stated or otherwise) included Gilbert's nonmembership in LL 707, as well as the stated reasons of Gilbert's present nonemployment in one of the (P&W) shops coming under the jurisdiction of DL 91 (by virtue of recent Settlement Agreement) that disqualified Gilbert.

Finally, the same letter informs Gilbert:

* * *

> The February 16th nomination meeting was adjourned when you engaged in conduct unbecoming of a member by refusing to accept the rulings of the Chairperson, by using loud and profane language, and by generally preventing the orderly conduct of the business of the Local. A meeting will be held on February 23, 1986, at 10:00 a.m. at the Union Hall to complete the business that was not completed at the February 16, 1986 Meeting. It is difficult enough for the Union to attract members to meetings without the additional problems of disruptions and unnecessary adjournments. Therefore, this is to request that, should you attend the meeting on February 23, 1986 or any other meeting, you conduct yourself in keeping with the duties of a member under Article L, Section 3 of the International Constitution in order to avoid having to again adjourn the meeting.

The General Counsel does not allege the same is independently violative of the Act.

Poulin testified that there was an inquiry made of International on Gilbert. Though initially testifying that Gilbert sent a wire to the IP, Poulin later testified that he didn't know whether the inquiry made of the IP was by document (e.g. telegram) or phone inquiry. No telegram has been produced. What Poulin did know and has testified to is that he received a copy of an IP response. That response (Resp. Ex. 19), an IP wire dated 21 February 1986, addressed to Gilbert, pertinently provides:

IN REURTEL, BE ADVISED THAT I HAVE BEEN INFORMED BY WALTER L. NIXON, III, PRESIDENT OF LOCAL LODGE 707, THAT YOU WERE DISQUALIFIED FROM NOMINATIONS AS LABOR REPRESENTATIVE OF DISTRICT 91 IN ACCORDANCE WITH ARTICLE X OF DISTRICT 91 BYLAWS, AS YOU ARE NOT ACTIVELY EMPLOYED IN ONE OF THE SHOPS COMING UNDER THE JURISDICTION OF DISTRICT 91.

PLEASE BE ADVISED THAT I FIND THAT PRESIDENT NIXON WAS CORRECT IN RULING YOU NOT QUALIFIED AS A CANDIDATE FOR THE POSITION OF LABOR REPRESENTATIVE.

Nixon testimony confirms that he called an additional meeting for 23 February 1986 for the purpose of completing LL 707 nomination proceedings (as required) in the month of February of the election year. However, when this special meeting did not receive the required institutional member attendance response, the meeting had to be cancelled. As a result LL 707 was unable to nominate and endorse *any* of its candidates for election to DL 91 dlr.

final analysis of Ll 707 conduct preventing
Gilbert dlr nomination

It is readily apparent from the above wire that the IP ruling addressed only a Nixon reported failure of Gilbert to qualify on the basis of an employment in one of the shops coming under the jurisdiction of DL 91, on which the IP ruled in agreement. But Gilbert didn't claim to Nixon that he was qualified to run for dlr on that basis. What he did clearly recently claim to Nixon is that he was a member in good standing, and claimed all rights of membership under the two prior Board decisions. Whether

Gilbert *at this time* explicitly claimed he was qualified to run as an incumbent dlr is more questionable. However, Gilbert had previously made clear claim to both LL 707 and DL 91 that he had not resigned; and he did earlier assert right of recall to open dlr position during his unexpired previously elected term which I have found was unlawfully denied him.

Poulin has otherwise testified that it was apparent *to him* after the Settlement Agreement that Gilbert was not qualified to run for dlr. However, all that is apparent from the Settlement Agreement itself that is material to the issue of Gilbert's DL 91 qualifications is that Gilbert was, and would be no longer employed by P&W. In contrast with IP wire, Gilbert never raised the claim he was qualified on that basis after the Settlement Agreement was executed.

The parties did not address the issue of Gilbert's dlr qualifications in reaching the Settlement Agreement. They readily could have; but this record indicates they simply didn't. Moreover, Poulin has specifically testified that the IP had not discussed the matter of Gilbert eligibility with him; and Poulin also testified that he could not change the interpretation of the IP as made. Nixon has not testified as to raising other issues to IP. Indeed, Nixon did not testify as to a contract with the International at all; and, of course, International is not charged with anything. But Nixon's variant hearing testimony as to his own reason(s) for his actual disqualification of Gilbert's nomination varied, and I have found in critical membership part, is unconvincing. The above limited addressment by IP does not serve to absolve president Nixon of his conduct paramountly evidenced herein as with real unlawful motivation to disqualify Gilbert, and prevent his nomination. That act effectively prevented Gilbert from the exercise of his Section 7 right to participate in union activity by seeking DL 91 office without any LL 707 obstruction based on LL 707 contended nonmember-

ship in the Union; or, hostility to Gilbert's prior exercised Section 7 right to internal union dissidence, to file charges and to support the same with testimony before the Board; to continue to seek to represent employees as a dlr; and prevented Gilbert as well from having the opportunity to have his positions and service to the union members evaluated in the first instance by a nomination of LL 707 members, and eventually by the members of LLs affiliated with DL 91. It is no defense to Nixon and/or Respondent LL 707 that as the event played out *not* LL 707 member ended up being able to be timely nominated, endorsed and participate in the election.

Ineed even if it be assumed that Nixon's action was truly singular, without any DL 91 input, it is then presented as both one solely taken on his own, without consultation with anyone (let alone without LL 707 executive board notice or approval), and accomplished in a manner on its face flying in the face of known fundamental procedures that appear to govern all constitutional LL action. Thus, effectively Nixon's refusal to accept an (at least) initial orderly challenge to his ruling effectively took the matter when contested by Gilbert out of the hands of the LL body lawfully assembled, and thus blocked any possibility for the LL's own timely rejection of Nixon's ruling. Moreover the position Nixon took and held firmly to, with attendant procedural departure justified on the basis of holding to DL 91 Bylaws, in substance and effect constitutes but a Nixon interpretation of Gilbert's failure to qualify under DL 91 Bylaws. Thus his decisional interpretation stands in stark contrast with the clear weight of other union witnesses, who have variously but (essentially) cumulatively asserted that where there is question of eligibility of a member who desires to run for dlr, or it is anticipated the eligibility of the individual may be contested, the resulting Congressional and Bylaws interpretations are for the IP. Insofar as evidenced in this record, inquiry on eligibility where questioned or question-

able had been made in advance for others, but not for Gilbert.

Finally to the extent it is to be argued that even if Nixon acted institutionally improper, that deficiency is cured with IP ruling upholding Nixon on the ruling disqualifying Gilbert on the ground stated, that argument must be rejected. I am convinced that Nixon operated with at least partial reliance on 707's contention that Gilbert lacked membership. It is also no defense to LL 707 violation of the Act that the International ruled on a nondispositive manner.

I have earlier found that General Counsel's proffered and credited evidence has made out a strong prima facie case that, in violation of Section 8(b)(1)(A), president Nixon and LL 707, on 16 February 1986, restrained and coerced Gilbert and other employees by preventing the nomination of Gilbert to run for dlr elective office. Respondent LL 707's proffered evidence has failed to convince me of the contrary.

final analysis of DL 91's conduct in
preventing Gilbert dlr nomination

The complaint additionally alleged that since on or about 1 February 1986, DL 91 also violated 8(b)(1)(A) in failing and refusing to allow Gilbert to be nominated as a candidate for election to dlr position.

Poulin testified that DL 91 was in touch (on Gilbert's eligibility) with the International through Almeida, or Webber; and otherwise (generally) he may have had a conversation with Almeida about it. As noted there is no evidence presented of a DL 91 written inquiry of Poulin or International on Gilbert (as there is in abundance for Hoffman and Kiefer); and Respondent's counsel of record appears to have represented he was aware of none. Rather than evidencing nondiscriminatory IP rulings in application to Gilbert and others, the disparate treatment of Gilbert at DL 91 level is apparent.

Almeida testified, at least on one occasion, that DL 91 determined that Gilbert was not eligible under the Constitution and DL 91 Bylaws to run for election to dlr position. Almeida testified *generally* to having had discusison with Gilbert and others about a conclusion of DL 91 that Gilbert and others (e.g. Kiefer and Hoffman) did not meet the eligibility requirements of dlr position. Almeida also testified that it was his opinion that Gilbert was not eligible. However, Almeida clarified that he did *not* make the decision on Gilbert (or the others).

Almeida testified that he discussed Gilbert's (and others') eligibility with (then) Directing LR Webber. *Significantly, Almeida testified that Webber was to get the IP clarification on the candidates, including Gilbert; and he though Webber had sought the clarifications.* Webber has not testified at all as to seeking clarification from IP about Gilbert's eligibility. Rather she asserts she gave no thought to appointing Gilbert, and it was not discussed with her. It is clear she did so for the others (Hoffman and Kiefer) beginning in late 1985, which appreciable process continued through January, into early February 1986.

Almeida also testified that he saw the writings on Kiefer and Hoffman, and IP responses holding them unqualified. Almeida had also testified that International's decision (on Gilbert) was consistent with their opinion on Gilbert's eligibility and qualification. However, Almeida's testimony as to awareness in writings (inquiry and IP response) as to Gilbert's eligibility is somewhat confusing. Almeida testified (initially) that he saw a copy of a writing to the IP on Gilbert; and he testified (initially) he *thought* a communication, or interpretation came down from International on Gilbert (as it did on Kiefer and Hoffman). However, Almeida testified that he did not *see* International's answer on Gilbert, or if he did, he did not recall it. After Respondent's Counsel of Record had represented he was unaware of International documents on

Gilbert (seemingly of Kiefer and Hoffman nature), Almeida then testified that to his (own) knowledge there are no (such) documents.

Almeida otherwise testified that he did recall a conversation with Poulin and Engelhard, but (only) in a meeting in regard to other federal litigation, and to the effect that Gilbert probably would have to be disqualified, to be consistent with the applications made to Hoffman and Kiefer. However, Almeida acknowledged that neither Hoffman or Kiefer held an elective (e.g. dlr) office (with tenure); and certainly neither could qualify as a laid off incumbent dlr with tenure. (It will be recalled that Hoffman had resigned her DL 91 employment, and Kiefer was laid off from a nonelective position, and later employed part time, by DL 91 while on LOA from another employer (ULA). Hoffman was also employed elsewhere, and worked (at best) part time if not casually for DL 91. Their circumstances clearly did not present the issue of an incumbent dlr on layoff, with unexpired tenure, let alone the question of independent qualification on the basis of "victimized." Although Almeida has testified relatedly that an issue of "victimized" is for IP interpretation, Almeida has also testified that an incumbent dlr, though not employed in the shop (e.g. P&W, can run; and *that if Gilbert did not resign*, his term did not expire until 1986; and, if an active dlr, he was eligible to run again. Even more significantly, Almeida has testified that if Gilbert had been reappointed (recalled) in 1985, he would have been eligible to run again. At the very least there were recognizable issues to be presented to the IP for clarification if Gilbert was not to be treated disparately from Kiefer and Hoffman.

There is limited suggestion of record that Almeida, at *this* time, may have personally preferred that Gilbert be allowed to stand for dlr election. Whether that be the case or not, is not controlling of the issue. Neither does

the same, if so, convince me that there was not a continuing animosity between Almeida and Gilbert. Although, on the record before me, unlike that before my predecessors, it appears that Almeida in the main, kept those ill feelings in greater check. Nonetheless, it is clear to me that neither did Almeida do anything to press DL 91 to seek formal interpretation on Gilbert's eligibility. This record wholly convinces me there was *no* formal submission by DL 91 on Gilbert's eligibility, and for that disparate circumstance DL 91 is clearly responsible. It is clear to me also that (at least) as early as 7 February 1986, if not shortly after the Board's decision issued on 16 January 1986, tha DL 91 officials were well aware that Gilbert actually intended to run, and they took active steps at the DL 91 and LL levels to prevent his nomination. It is concluded and found that General Counsel has also made out a prima facie case that (at least) since on or about 7 February 1986, Respondent DL 91 failed and refused to allow Gilbert to be nominated as a candidate for election to dlr position. As in the case of analysis of Nixon conduct heretofore determined unlawful, the proffered evidence as to DL 91 justification wholly fails to persuade.

Thus the Settlement Agreement does not carry the day for DL 91, any more than it can do so for LL 707. The fact that it appears there is no dlr representative at the time of president Nixon's unlawful conduct on 16 February 1986 does not save DL 91, where there is convincing evidence that DL 91 representative Rondeau (albeit reluctantly) is engaging in the same pattern of Gilbert nomination prevention. The disparate silence as to DL 91's presentment of Gilbert real eligibility issues to International, speaks volumes as to DL 91's real intendment; and, in my view, it is not overcome by the IP wire to Gilbert addressing *specifically* only a matter never shown raised by Gilbert, and (at best) only advanced by Nixon opportunely.

Finally, I accept on this record that Constitutional interpretations of one individual member's qualifications to run for DL dlr position *are* for the IP, and specifically so on "victimized." The effect of the facts found herein that Gilbert had only submitted a conditional resignation; that the condition never occurred; that Gilbert effectively never resigned, and that he was unlawfully not recalled, I do not view to rest on such. Whether Gilbert was qualified as in incumbent dlr with unexpired term though laid off for more than a year, in my view, need not be reached.

First, the evidence before me, when all is marshalled and closely analyzed, reflects that DL 91 never presented those issues to the IP for clarification but rather, while contemporaneously doing so for favored others actually participated in the prevention of Gilbert from being nominated on another unurged basis. Secondly, the disparate treatment was conducted in a background of hostility to the same protected conduct of Gilbert as earlier noted in connection with LL 707. This also describes DL 91 restraint and coercion of Gilbert and employees in violation of Section 8(b)(1)(A) of the Act. Bu there is still another, and in agreement with General Counsel, in my view, wholly dispositive consideration why DL 91 must be found to have additionally violated the Act in the above respect. The remedy of prior violation requires it.

In that regard, I have earlier found that since on and after 11 March 1985 Respondent DL 91 had unlawfully refused to recall Gilbert (firstly) to an open reinstituted dlr position for which he had more seniority than the individual (Tinella) recalled in his place; and (secondly), that DL 91 thereafter even refused to recall Gilbert to a dlr position that subsequently became vacant on 1 May 1986 with dlr Webber's interim election to Directing LR position in April 1986, all in violation of Sections 8(a)(4), and (3) and (1).

Normal Board-ordered remedy for such violation(s), apart from a directed make-whole backpay remedy, is clearly to direct an immediate and full reinstatement to the position Gilbert would have occupied but for the above discriminations, *together with all rights and privileges of the employee's former position.* Although Gilbert's (previously (elected dlr tenure expired on 30 April 1986, it appears to me hardly open to question as a sequitur of the specific unfair labor practices found above that a full reinstatement of Gilbert would normally and rightfully encompass the right and privilege on Gilbert's part to claim status of an incumbent, at least through 30 April 1986. On that basis Gilbert was *unquestionably* eligible on this record to have run in 1986 for reelection to dlr position as a qualified incumbent. In that regard, the contention that only the IP can address International's Constitution and DL 91 Bylaws for purpose of interpretation of "victimized" provisions contained therein, can in *no* way serve to restrict the Board in fashioning its own appropriate remedy for DL 91's commission of the earlier found unfair labor practices involving non-recall to available dlr position(s).

Finally, to the extent Respondent DL 91 would seek to argue that one of the effects of the Settlement Agreement is that its terms preclude a warrant for such a remedial order, that argument, in my view, also cannot prevail. Attorney Gregg D. Adler, who represented LL 707 (not DL 91) and Gilbert (indirectly as grievant) in the arbitration (and related) matters, testified before me that how the Settlement Agreement impacted on Gilbert's (conditional) resignation was not discussed as a part of the Settlement Agreement; indeed, Adler has testified that he was not even aware that was an issue. Thus, although the record reflects that there were a number of discussions, on the one hand, by LL 707's attorney Adler with Englehard (then) representing the unions (International, DL 91 and LL 707, and certain of their officers) involved in the Gilbert (LMRA) federal action (not being

covered by Settlement Agreement) and as well (apparently) with International's counsel; and, on the other hand, that there were a number of Adler and/or Gilbert related conversations with Gilbert's counsel of record (and other member(s) of firm) representing Gilbert (and others) in the same federal action, and perhaps other State Court matters), and while there is no doubt that a variety of all the parties' interests were effectively being accommodated in the language ultimately utilized to record the Settlement Agreement reached on the multiple matters the Settlement Agreement covered, the fact is that neither by its terms, or otherwise, did *this* Settlement purport to resolve the specific matter of a Gilbert claim to DL 91 layoff status (and recall right) vis-a-vis conditional resigation of dlr status. Neither does it appear, on this record, that effect was even in the contemplation of the parties.

The fact is that Gilbert has testified that he has never (before or after this Settlement Agreement) returned to P&W employ, nor occupied the position of third shift safety representative, which was the very condition precedent to effectuation of his resignation. Gilbert has also testified credibly he has never been recalled as a DL 91 dlr.

Poulin, who was in communication with union counsel of instant record (then representing International, DL 91 and LL 707 in the federal action) in regard to settlement discussions, and who has testified that he wanted to make sure in that regard that International's and his own "vested" interests (vis-a-vis Gilbert's federal action, that, *inter alia*, named International and him), *as well as Gilbert's interests were fully protected*, has significantly testified that the (question of) eligibility of Gilbert (to run) for dlr position wouldn't enter that conversation; and Poulin also recalled no concern by LL 707 on Gilbert's eligibility raised at that time.

In these circumstances, just as I would not detract from the terms of the Settlement Agreement as clearly reached by the parties, neither would I (effectively) add to it by implying that an entry into this Settlement Agreement carried with it any surrender of Gilbert's claims resting on continuing dlr status. If the parties had intended more than that, they could surely have easily stated it. Moreover, in my view, since DL 91's now determined commission of the above unfair labor practices in regard to its failure to recall Gilbert to open dlr position occurred much earlier, (and indeed were at the time also subject of open instant complaint) subsequent private remedy to which General Counsel is not party, cannot, and does not preclude Board provision for an appropriate remedy for a meritorious matter that the General Counsel has timely pursued, and on which the General Counsel has now prevailed.

For all of the above reasons it is further concluded and found that in violation of Section 8(b)(1)(A) DL 91 has restrained and coerced Gilbert, and other employees, by failing and refusing to allow Wayne A. Gilbert to be nominated as a candidate for election to the position of DL 91 dlr.

Conclusions of Law

1. Local Lodge No. 707, International Association of Machinists and Aerospace Workers is a labor organization within the meaning of Section 2(5) of the Act.

2. Aeronautical Industrial District Lodge No. 91 International Association of Machinists and Aerospace Workers is a labor organization within the meaning of Section 2(5) of the Act; and it is also an Employer within the meaning of Section 2(2), (6) and (7) of the Act.

3. In period December 1983 through November 1984 Wayne A. Gilbert engaged in protected intraunion activity of preparing and/or distributing views and opinions critical of union officials, and engaged in other protected

conduct of filing unfair labor practice charges against the above unions; and he gave testimony in support of the charges and at hearings before the Board.

4. By filing a Verified Complaint and Application for a Temporary and Permanent Injunction and Temporary Restraining Order against Gilbert in the Superior Court of the State of Connecticut, Judicial District of New Haven, on 7 December 1984 in retaliation for Gilbert's engagement in the protected conduct described in paragraph 3 above, Respondent Local Lodge No. 707 has engaged in conduct in violation of Section 8(b)(1)(A) of the Act.

5. By failing to recall Wayne A. Gilbert to a position of District Lodge Labor Representative on and after 11 March 1985, because Gilbert has engaged in the protected conduct described in paragraph 3 above, Respondent District Lodge No. 91 has engaged in conduct in violation of Sections 8(a)(1), (3) and (4) of the Act.

6. By failing and refusing to allow Wayne A. Gilbert to be nominated as a candidate for election to the position of District Lodge No. 91 on and after 6 February 1986, and Respondent Local Lodge 707 on and after 16 February 1986, have engaged in conduct in violation of Section 8(b)(1)(A) of the Act.

7. Except as found above Respondents Local Lodge No. 707 and District Lodge No. 91 have not engaged in any other conduct in violation of the Act.

The Remedy

Having found that Respondent LL 707 and DL 91 have engaged in the certain unfair labor practices as found above, I shall recommend that they be ordered to cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act. I shall provide for the posting of an appropriate

notice to DL 91 employees and DL 91 and LL 707 members.

The General Counsel has urged that Respondent Local Lodge No. 707 should be ordered to reimburse Gilbert for the legal and other expenses incurred in Gilbert's defense of Respondent Local Lodge 707's retaliatory Superior Court action brought against Gilbert. Reimbursement for all legal expenses limited to defense of that proceeding appears appropriate, and I shall provide for it, *Power Systems, Inc.*, 239 NLRB 445, 450 (1978).

Having found that Respondent DL 91 failed to recall Wayne A. Gilbert on 11 March 1985 and thereafter to position of DL 91 Labor Representative it is appropriate that provision be made that Gilbert be made whole. An issue on the scope of the remedial make whole provision arises because the record reveals Gilbert properly recalled on 11 March 1985 would have been recalled at that time to a dlr term ending 30 April 1986. However, I have also found that both Respondents DL 91 and LL 707 have engaged in additional unlawful conduct in effectively preventing Gilbert from running for reelection to DL 91 dlr position thereafter, as an incumbent.

In initial brief the General Counsel had urged that if Gilbert's status is to be restored "as nearly as possible to that which would have attained but for the illegal discrimination," that a rerun election should be directed to be held for the purpose of determining whether Gilbert should be entitled to serve another term as DL 91 dlr. Otherwise, so argued General Counsel, Gilbert may be denied backpay he would have been entitled to (if successful in reelection bid). Specific supporting case authority was not provided at the time.

Respondents have correctly observed the cases heretofore submitted by General Counsel dealt with other backpay issues. Respondent argued that General Counsel in effect was seeking a novel and/or extraordinary remedy.

With opportunity provided, all parties have now filed additional and helpful briefs on this remedial issue.

General Counsel argues the issue is not novel, but has now urged an even broader remedy with stated reliance (only) on a newly-discovered case, *Iron Workers (Walker Constr. Co.)*, 279 NLRB No. 123 (13 May 1986). General Counsel's argument is that merely requiring a rerun election will not undo the effects of Respondent's above unfair labor practices; and, General Counsel now urges that, "[T]he most appropriate remedy which can restore the status quo an assure that Gilbert will not be denied compensation he might have otherwise received is to direct the Respondent District to reinstate Gilbert to his position as District Labor Representative with full backpay and to rerun the 1986 election after Gilbert has had a period of incumbency equal to the time left in his term of office when he was unlawfully denied recall." With stated reliance on the same case, Charging Party argues such a remedy is not punitive, but only remedial in nature.

Respondents argue first that the Board does not have jurisdictional authority to order an internal union election to be run. The argument made, simply put, is that under "LMRDA" Congress has expressly and exclusively designated jurisdictional authority to direct and supervise the rerunning of an internal union election to the Secretary of Labor. Respondent relies on the holdings of *Local No. 82, Furniture & Piano Mov. v. Crowley*, 467 U.S. 526, 544, 104 S. Ct. 2557, (1984); *Trbovich v. UMWA*, 404 U.S. 528, 530 (1972); *NLRB v. Allis-Chalmers Mfg. Co.*, 288 U.S. 175, 185, 187 (1967); *Calhoon v. Harvey*, 379 U.S. 134 (1964); *Anson v. NMU*, 595 F. Supp. 847, 851 (S.D.N.Y. 1984); and (essentially) the exclusivity provision of LMRDA § 403, itself, which provides:

> The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

The problems with Respondent's arguments would appear to be several. Firstly, the instant case does not involve issues of private usurpations, State remedy inadequacies, or individual member challenge. Secondly, the unfair labor practice found here and to be remedied is fundamentally an instance of unlawful union conduct extending an effect beyond internal affairs and in manner unlawfully interdicting Gilbert's direct exercise of protected Section 7 rights which are particularly entrusted to the Board to safeguard, *NLRB v. Marine Workers*, 391 U.S. 418 (1968); and *Scofield v. NLRB*, 394 U.S. 423 (1969). In my view Respondent's reliance on the Board's holding in *Desert Palace, Inc.*, 194 NLRB No. 818, fn. 5 (1972), in leaving an issue raised before it on labor organization status, based on that organization's compliance with the Landrum-Griffin Act, to appropriate forum under that Act, is inapposite. Congress has provided the Board with broad remedial authority to cure invasion and/or denial of Section 7 rights, and the Board has heretofore exercised remedial power under the Act, broadly, particularly on matters involving "unimpeded access to the Board," *Operating Engineers, Local 138 (Skura)*, 148 NLRB 679 (1964). Thirdly, and dispositively it would seem, at least upon me, the Board itself has already addresesd an attack made upon the exercise of its remedial authority in a *proper* case vis-a-vis an ordered rerun of an internal union election, and it has determined the challenge lacked merit, *Iron Workers (Walker Constr. Co.)*, 279 NLRB No. 123, pg. 2 (13 May 1986).

However, in their stated reliance on the *Crowley* case, *supra*, (a case in which the Supreme Court addressed a Federal District Court Order of a new election that ignored Secretary of Labor expertise) the Respondents have otherwise raised a concern that an Order of the Board directing a rerun of the 1986 election, "also could possibly give rise to a cause of action under the LMRDA

on behalf of someone who had run successfully in the first (sic 1986) election but lost in the second (sic rerun) or on behalf of union members who voted for such a person in the first election." Although the case is not controlling on the authority of the Board to effect remedy in the instant matter, given the underlying circumstances of this case, it does appear to raise valid considerations for evaluation by the Board that bear on the appropriateness of the Board issuing a remedial order that would vacate the 1986 election and/or direct a rerun election, and as well, of the propriety of an imposed Gilbert incumbency that might affect the other elected incumbents.

In the *Iron Workers*, case, *supra* on which General Counsel and Charging Party (solely) rely to both vacate the interim election, and to impose Gilbert incumbency, there, the return of the discriminated (former) president for a related period of incumbency, was to the singular office of president, in which a singular subsequently elected incumbent of that office would alone be removed. Here, to vacate the April 1986 election would not only adversely effect (at least) 8 indistinguishable incumbents, it would, in my view, adversely and improperly impact on the rights of other LLs and their members' designations, without having afforded any of those LLs or their members due process. At least to that extent, the *Iron Workers*, case *supra* is deemd properly to be distinguished. I decline to recommend to the Board that the Board vacate the election of April 1986. I shall however otherwise fashion a tailored remedy designed to put Gilbert back in the position he would have enjoyed, had he not been discriminated against by DL 91's failure to recall him, and, had DL 91 and LL 707 not unlawfully prevented his nomination in February 1986 at least to extent the same would otherwise appear feasible.

First, it will be recommended that the Board order District 91 and LL 707 to permit Gilbert to run as an incumbent candidate for election to DL 91 dlr position in

the next election to be held, and as soon as possible. Second, in that event, including if there be an interim opening in dlr position with unexpired tenure of that position remaining with time equivalent to Gilbert's clearly denied incumbency (to wit equivalent of the period from 11 March 1985 to 30 April 1986), either more or less, no election shall be conducted for that position until Gilbert shall have first had dlr incumbency afforded to him of that duration. Third, by payment of backpay, with interest [4] Respondent DL 91 shall make Gilbert whole for any loss of pay and benefits Gilbert may have suffered during the period extending from 11 March 1985 through 30 April 1986; and, DL 91 and its affiliated LL 707, jointly and severally, shall additionally make Gilbert whole by payment of backpay to him, with such computed interest, for the period 1 May 1986 until such time as Gilbert shall be allowed to lawfully participate in an election as a candidate for dlr position; or, upon notice of same, Gilbert shall decline to do so, or fail to respond in reasonable time.

Backpay shall otherwise be computed in acordance with quarterly formula, *F. W. Woolworth*, 90 NLRB 289 (1950). Any related questions of interim earnings, including identified backpay in P&W Settlement Agreement, may be handled at compliance stage.

Fourth, it will be recommended that DL 91 and LL 707 post a copy of the attached Notices in their respective halls; and that DL 91 provide copies of said notice to other LLs affiliated with DL 91, for posting in their halls, they being willing. However, inasmuch as the record be-

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[4] In accordance with the Board's decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

fore me makes clear that DL 91 had been in communication with its affiliated LLs prior to the April 1986 election, and has occasioned (at least) LL 700's actual declination of a nomination to Gilbert, it will be recommended that DL 91 be ordered to notify LL 700 and all its other affiliated LLs, in writing, that it has no objection to the nomination in the next election to be held for that position. I shall further provide that LL 707 similarly notify its members.

The General Counsel has additionally urged that a "visitorial clause" be provided in the remedial order, one authorizing the Board to engage in discovery if necessary to monitor compliance with the Board order. Under the circumstances of this case it appears such a clause is not warranted. I shall however recommend the issuance of a broad remedial Order against DL 91 and LL 707, as to Gilbert.[5]

Finally I have considered all of Respondent's remaining arguments as advanced herein, those resting on Gilbert's purported failure to exhaust internal union remedies; failure to file election complaint with Secretary of Labor; failure to file related suit under Title 1 LMRDA in Federal Court; and failure to request 10(j) relief of

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[5] This is the third instance in which LL 707, and the second instance in which DL 91 have been found to have violated the Act in their conduct against Gilbert. The cases involving Gilbert have become increasingly complicated, and the Board must look to some husbandry of its resources. In no sense however, should this decision be read as condonation or vindication of Gilbert's conduct in every instance. Gilbert's conduct, as sought to be questioned before me by Respondent Unions appears, in the main, inextricably intertwined in relationship to initiating unlawful acts of Respondent unions. The simple fact is that DL 91 and LL 707 must actually stop the discrimination and restraint of Gilbert first, and presumably any institutional untoward conduct of Gilbert will then ameliorate; and, if it does not, Respondents DL 91 and LL 707 will then be in posture to protect and preserve their legitimate institutional and self-government concerns, cf. *Petramale* case, *supra*, 736 F.2d at 17.

the Board. I conclude and find the same are all without merit.

Accordingly, upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [6]

The Respondent District Lodge No. 91, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to recall Wayne A. Gilbert to an open position of District Lodge Labor Representative, because Gilbert has engaged in protected intraunion activity of preparing and/or distributing views and opinions critical of union officials; and/or because Gilbert has engaged in other protected conduct under Section 7 of the Act in filing unfair labor practice charges against the Union; and/or, because Gilbert has given testimony in support of the charges, and/or at hearings before the Board.

(b) Failing and refusing to allow Wayne A. Gilbert to be nominated as a candidate for election to District Lodge No. 91 Labor Representative, because of unlawful nonmembership, or because Gilbert has engaged in the above described intraunion and/or other conduct protected under Section 7 of the Act.

(c) In any other manner, interfere with, restrain or coerce Gilbert in the exercise of his Section 7 rights.

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[6] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Restore all benefits, rights and privileges of District Labor Representative status to Wayne A. Gilbert to the extent possible, and permit Gilbert to run for election as an incumbent candidate for District Lodge No. 91 Labor Representative position in the next election for that position to be held as soon as possible, and in the manner, and under the conditions described in the Remedy Section herein.

(b) Together with Local Lodge 707, make Gilbert whole for any loss in wages and benefits he may have suffered by payment of backpay to him, with interest, in the manner previously described in the Remedy Section herein.

(c) Notify all affiliated Locals, in writing, that District Lodge No. 91 has no objection to the candidacy of Gilbert as an incumbent in the next election to be held for district labor representative position, and that it will restore to Gilbert the denied period of his incumbency to the extent, and as early as, possible.

(d) Post at District Lodge No. 91's offices copies of the attached notice marked "Appendix."[7] Copies of said notice on forms provided by the Regional Officer in charge of Region 39, after being duly signed by Respondent's representative, shall be posted by Respondent District Lodge No. 91 immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to

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[7] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees and members are custorarily posted, at Local Lodge 707's hall, and at all other affiliated Local Lodge halls, they being willing. Reasonable steps shall be taken by Respondent District Lodge No. 91 to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Officer-in-Charge of the Board's Subregion 39, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

The Respondent Local Lodge No. 707, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Filing State Court lawsuits against Gilbert in retaliation: for Gilbert's engagement in protected intraunion activity of preparing and/or distributing views and opinions critical of union officials; and/or, because Gilbert engaged in other protected conduct under Section 7 of the Act in filing unfair labor practice charges against the Union; and/or because Gilbert has given testimony in support of the charges, and/or at hearings before the Board.

(b) Failing and refusing to allow Wayne A. Gilbert to be lawfully nominated as a candidate for election to District Lodge No. 91 Labor Representative, because of unlawful nonmembership in the Union, or because Gilbert has engaged in the above described intraunion and other conduct protected under Section 7 of the Act.

(c) In any other manner, restrain or coerce Gilbert in the exercise of his Section 7 rights.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Reimburse Charging Party, Wayne A. Gilbert, for all legal expenses he has incurred in the defense of that certain "Verified Complaint and Application for a Tem-

porary and Permanent Injunction and Temporary Restraining Order" filed against Gilbert in the Superior Court of the State of Connecticut, Judicial District of New Haven.

(b) Together with District Lodge No. 91 make Gilbert whole for any loss in wages and benefits he may have suffered by payment of backpay to him, with interest, for the period and in the manner previously described in the Remedy Section herein.

(c) Post at its offices at North Haven, Connecticut, copies of the attached notice marked "Appendix." [8] Copies of said notice, on forms provided by the Officer-in-Charge of the Board's Subregion 39, after being duly signed by Respondent's representative, shall be posted by Respondent Local Lodge 707 immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondent Local Lodge 707 to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Officer-in-Charge of the Board's Subregion 39, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. 31 December 1987.

/s/ Robert G. Romano
ROBERT G. ROMANO
Administrative Law Judge

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[8] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of August, one thousand nine hundred and ninety-one.

Docket Number 90-4123

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

WAYNE A. GILBERT,
Intervenor,

v.

AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and LOCAL LODGE NO. 707, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondents.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellants AERONAUTICAL IND. LODGE NO. 91, I.A.M.A.W. & LOCAL LODGE 707

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX F

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 29

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

* * * *

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

* * * *

§ 160. Prevention of unfair labor practices

* * * *

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter; . . .

* * * *

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.